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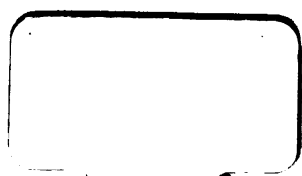
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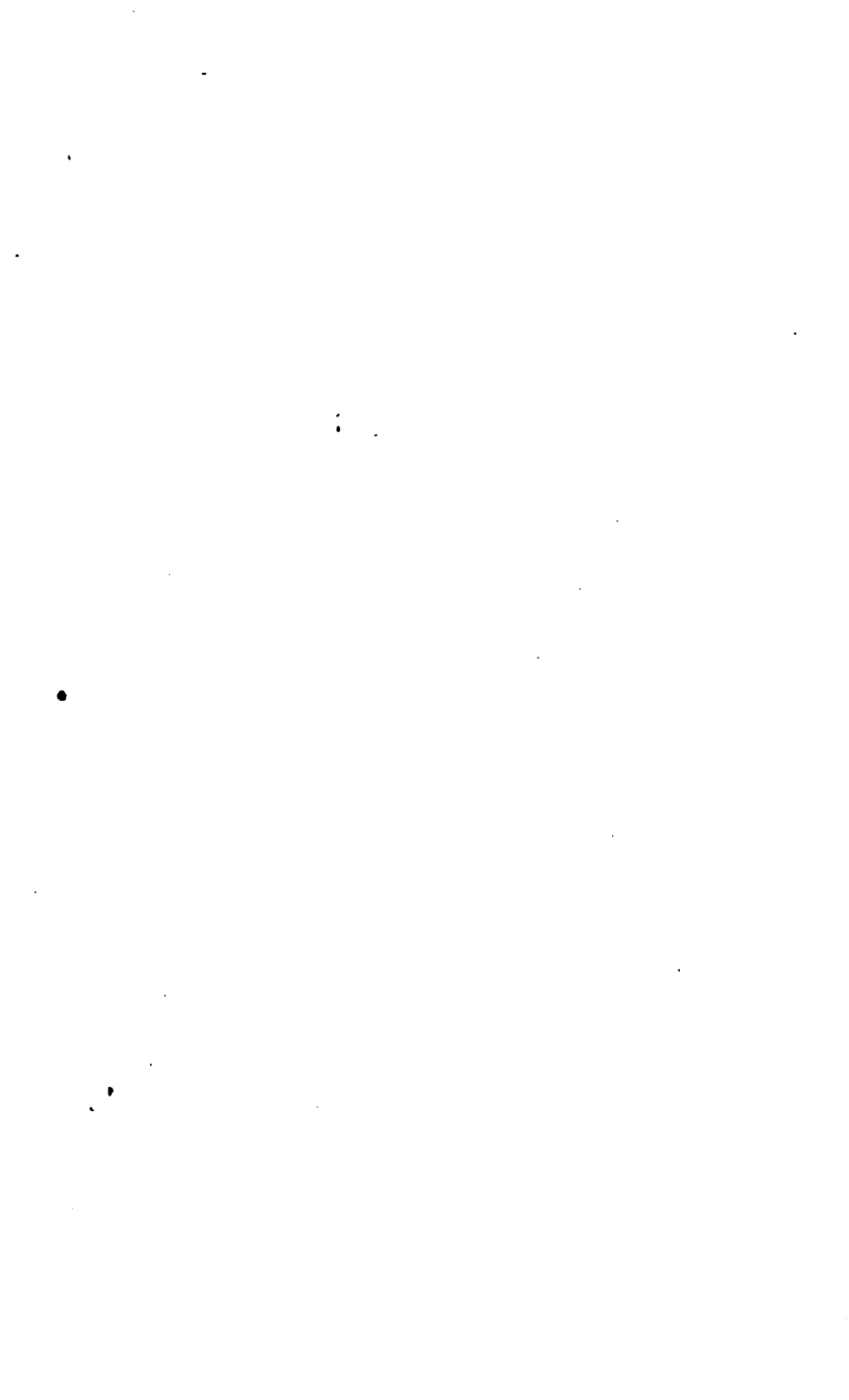
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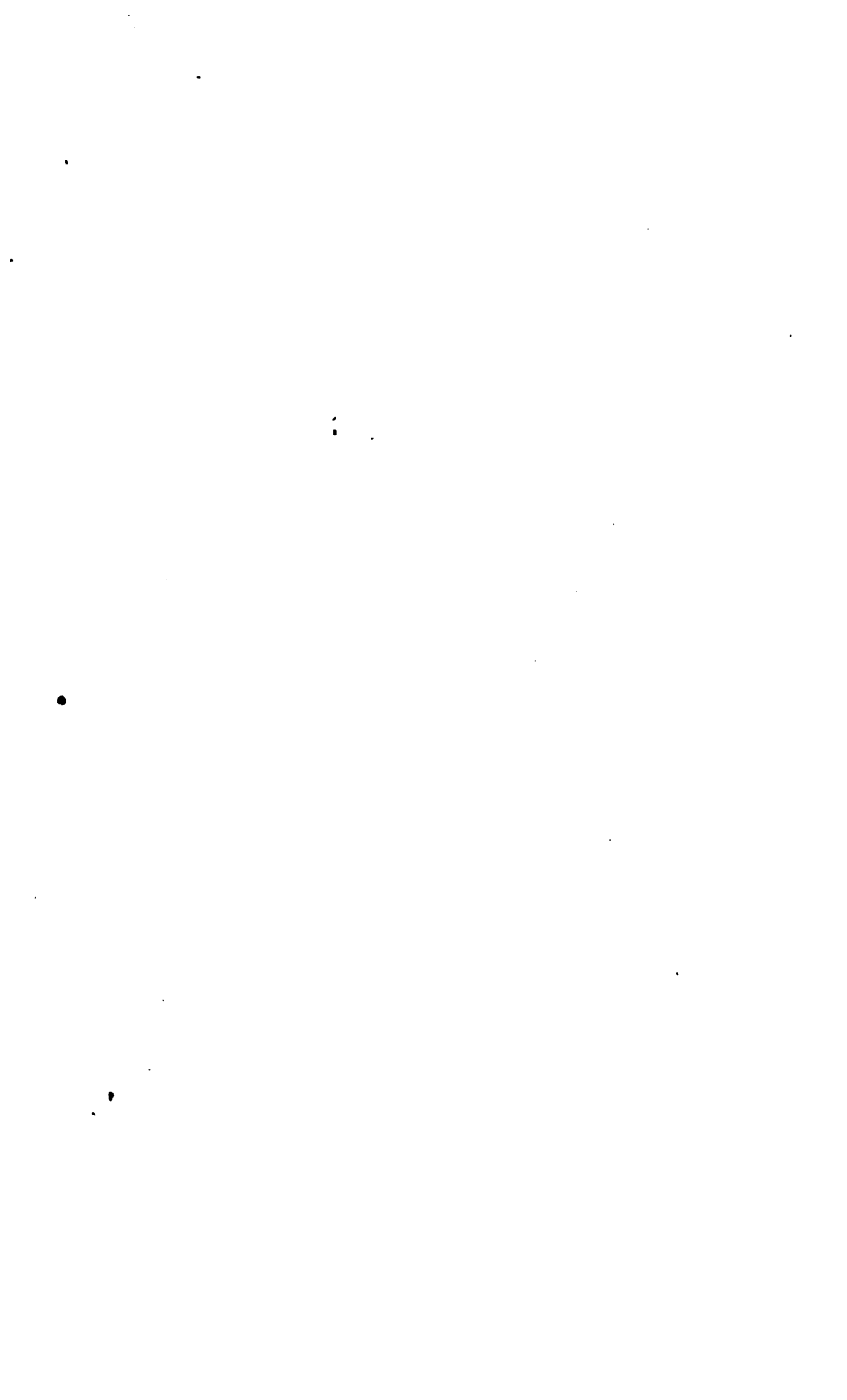
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A
CONCISE TREATISE
ON THE
LAW OF MORTGAGE.

BY
W. F. BEDDOES,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

SECOND EDITION.

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PREFACE

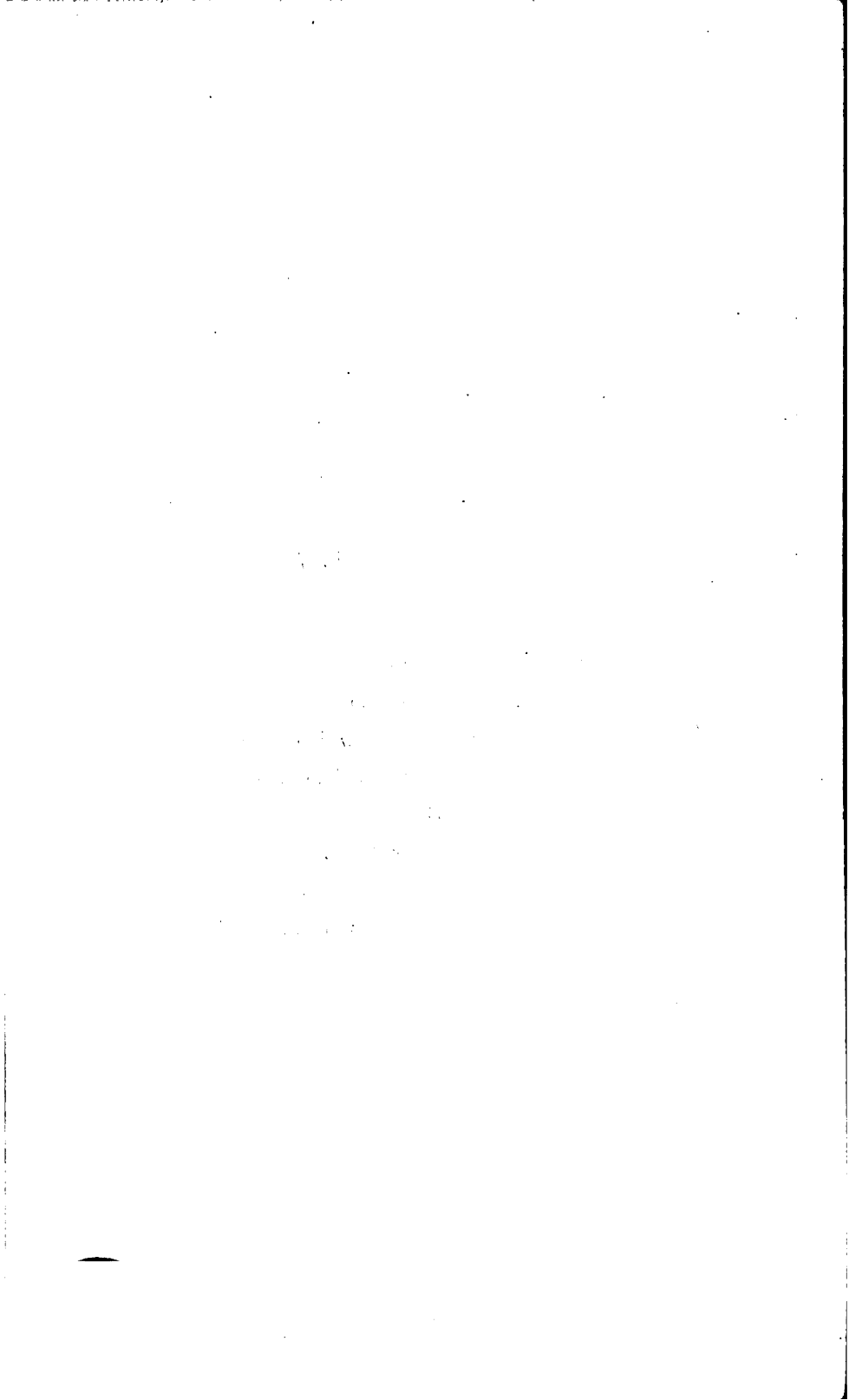
TO THE SECOND EDITION.

IN the present edition a chapter on the Land Transfer Acts has been added, and the cases reported from the date of the last edition to December, 1907, have been inserted.

The two principal difficulties which the practitioner encounters in this branch of law are, so it seems to me, the determination of the circumstances which may cause a mortgage earlier in date to be postponed to one later in date and the application of the Statutes of Limitation to the relation of mortgagor and mortgagee. Both these subjects are discussed at some length, and the best explanation of them in my power has been given. Various other additions have also been made, and the work has been revised throughout.

W. F. B.

9, STONE BUILDINGS, LINCOLN'S INN,
December, 1907.



PREFACE

TO THE FIRST EDITION.

THIS Work is an attempt to present, in a concise form, some portion of the stores of learning which are to be found in the standard works of COOTE and FISHER. It does not deal with that portion of the Law of Mortgage which relates to the subjects discussed in the Treatises on the Companies Acts and the Bills of Sale Acts.

This portion depends so much on the precise terms of statutory provisions that it stands apart from the general Law of Mortgage, and is of such volume and complexity that its insertion would have greatly increased the bulk of the work.

The point of view from which I have regarded the Law of Mortgage is that, in every case, there are two questions—the first, What is, in fact, the agreement of the parties as fairly inferred from all the circumstances? and the second, What is the just and equitable thing to be done considering the position in which the parties have placed themselves?

It is in the consideration of the latter question that the peculiar doctrines of the Law of Mortgage are mainly

applicable, for the most precise evidence of the agreement of the parties will not induce the Courts to enforce a contract of mortgage which is not just and equitable, according to the doctrines of the Court, as shown by the decided cases.

I have not dealt, except very shortly, with the origin or historical development of the Law of Mortgage, but have, so far as I could, brought before the reader, in a concise form by means of short paragraphs and subdivisions, the various questions to which any particular circumstance may give rise, together with the authorities and reasons in favour of the different views.

My best thanks are due to my friend Mr. R. S. Mushet, of Lincoln's Inn, for his assistance and advice in preparing this Work for the press.

In order to facilitate reference to any other report of a case than that mentioned in the text, the date of each decision is given in the Table of Cases.

W. F. B.

LINCOLN'S INN,
April, 1893.

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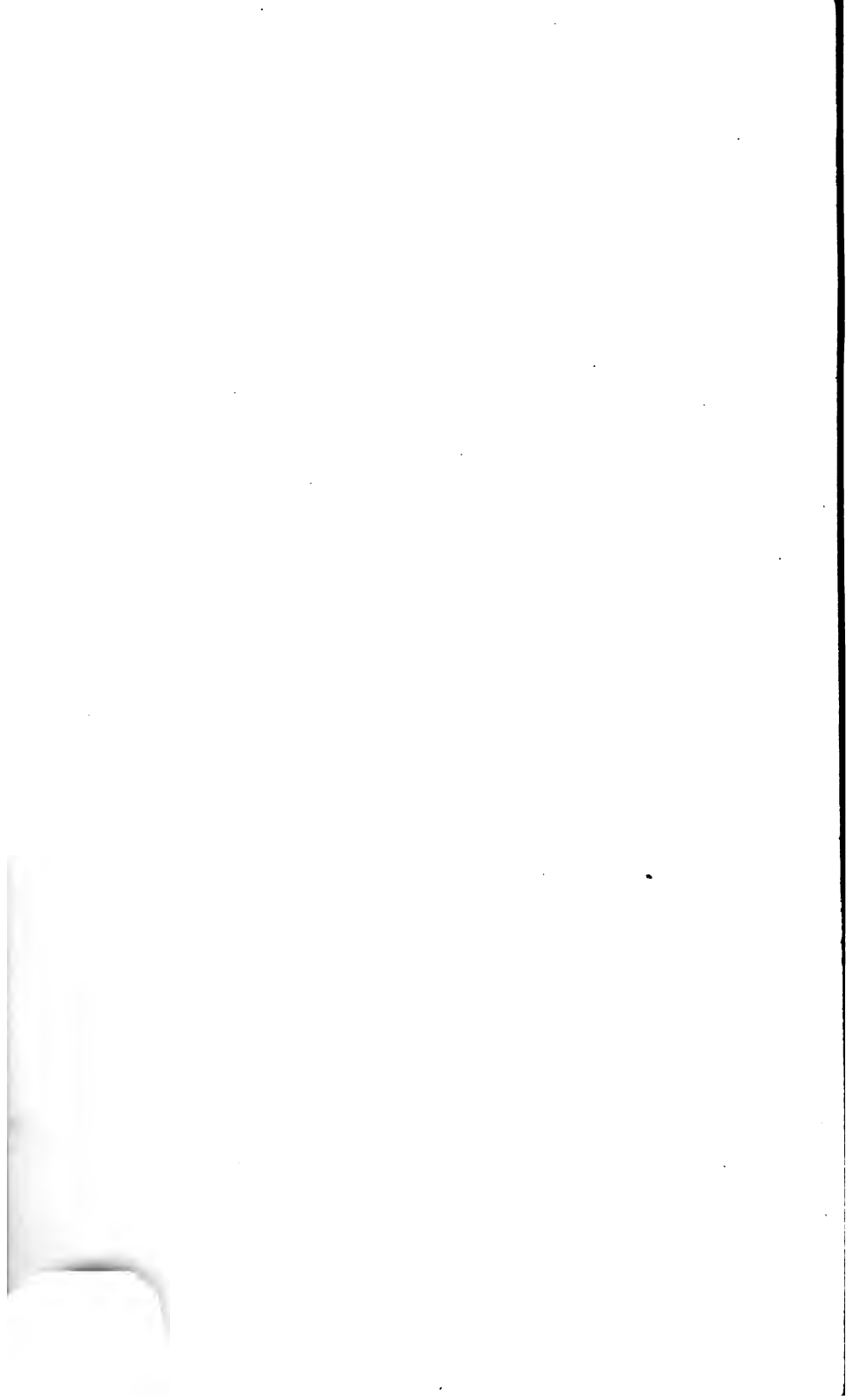


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THE LAW OF MORTGAGE.

CHAPTER I.

THE NATURE OF MORTGAGE.

THE form of a mortgage is an assignment of property by way of sale, followed by a proviso that the grantee shall reconvey the property if the money lent is repaid to him on a day arbitrarily chosen, generally six months after the date of the mortgage.

Form of mortgage a conditional sale.

The form does not express the intention of the parties; their desire is to make the property a security for the loan and, subject to giving the lender security, to leave the ownership of the property in the borrower.

Intention different from form.

Repayment of money lent is not necessarily the only object of a mortgage, which may be made to enforce the fulfilment of any agreement, but in the vast majority of cases the object of a mortgage is security for the repayment of money.

Usually to secure loan.

The Courts of equity have considered that the intention must prevail over the form, that is to say, in the case of a loan the borrower must have the right to regain his property if he repays the loan, though he may not have repaid it at the time or in the manner mentioned in the proviso for reconveyance.

Intention has prevailed over form.

The action of the Courts of equity is to carry out the rights of the parties as indicated by the transaction. The

Action of the Courts.

Courts do not enforce the terms of the agreement, but give justice in spite of the terms. The equitable interference of the Courts does not arise until the borrower has failed to perform the condition on which reconveyance was made to depend, and so has, according to the express words of the mortgage, lost all rights in the property.

Redemption as inseparable incident.

A loan may have been negotiated upon the express condition that the loan shall be repaid punctually on a fixed date, but even so the Courts of equity will not allow the borrower to be deprived of the mortgaged property because he has not punctually paid. A power of redemption is an inseparable incident of a mortgage. When the estate of the mortgagee has become absolute according to the terms of the contract, the equity of the Court of Chancery gives redemption to the mortgagor.

A mortgage security for a loan.

"The contract is in this Court considered a mere loan of money secured by a pledge of the estate. But that is a doctrine upon which this Court acts against what is the *primâ facie* import of the terms of the agreement itself, which does not import at law that once a mortgage always a mortgage; but equity says that, and the doctrine of this Court as to redemption does give countenance to that strong declaration of Lord Thurlow that the agreement of the parties will not alter it; for I take it to be so in the case of a mortgage that you shall not by special terms alter what this Court says are the special terms of that contract." Lord Eldon, *Seton v. Slade*, (1802) 7 Ves. 265.

Definition by Lord Lindley.

"A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given, and the security is redeemable on the payment or discharge of such debt or obligation any provision to the

contrary notwithstanding. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security is given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this that 'once a mortgage always a mortgage.' The Courts of equity have fought for years to maintain the doctrine that a security is redeemable." Lindley, M.R., *Santley v. Wilde*, 68 L. J. Ch. 681; [1899] 2 Ch. 474.

"An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery and therefore cannot be considered as a mere right only; but such an estate whereof there may be a seisin. The person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets." Per Lord Hardwicke in *Casborne v. Scarfe*, (1744) 3 Atk. 73, quoted by Lord Selborne, *Heath v. Pugh*, (1881) 6 Q. B. D. 345.

In the Court of Chancery the equity of redemption is an estate in the land.

The following are statutory descriptions of a mortgage:

The Conveyancing Act, 1881, s. 2, sub-s. (vi.) :—"In this Act mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property."

44 & 45
Vict. c. 41.

47 & 48
Vict. c. 54. The Yorkshire Registries Act, 1884, s. 3:—"The expression 'mortgage' in that Act includes any charge on land for securing money or money's worth and any transfer of a mortgage."

53 Vict.
c. 5. The Lunacy Act, 1890, s. 341:—" 'Mortgage' includes every estate, interest, or property in real or personal estate, which is a security for money or money's worth."

54 & 55
Vict. c. 39. The Stamp Act, 1891, s. 86:—"For the purposes of this Act the expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; . . ."
"and includes, *inter alia*,

"(c) Any conveyance of any lands, estate, or property whatever, in trust to be sold, or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified who accept the provision made for payment of their debts in full satisfaction thereof, or who exceed five in number."

56 & 57
Vict. c. 53. The Trustee Act, 1893, s. 50:—

" 'Mortgage' and 'mortgagee' include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee."

The Mortgagees Legal Costs Act, 1895 :—

58 & 59
Vict. c. 25.

“ ‘Mortgage’ includes any charge on any property for securing money or money's worth.”

These statutory interpretations are applicable only to the Acts in which they are respectively contained. They were framed to save space in Acts of Parliament by including under one word liens, mortgages, and charges.

The Merchant Shipping Act, 1894, s. 34, provides :—

57 & 58
Vict. c. 60.

“ Except so far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.”

This section applies only to mortgages of ships, but it illustrates the view that a mortgage, in spite of the form, should be regarded as a pledge or charge of the property and not as a conditional sale, and that the mortgagee is not owner, subject to the interference of the Court to protect the mortgagor, but that the mortgagor is owner, except so far as is necessary to make the mortgaged property available as a security for the mortgage debt.

If the conveyance, though not in form a mortgage, is, in fact, a security for the payment of money, or the performance of a condition, it is a mortgage, and, as regards the right of redemption by the mortgagor, there is no substantial difference between such a deed and an ordinary mortgage. *Bell v. Carter*, (1853) 17 B. 11.

Security
for pay-
ment of
money.

The form of the transaction is immaterial. The following are instances of transactions held to be mortgages, though not so in form :—

Form.

1. A conveyance to C. upon trust to reconvey to A. if he should repay a loan to B., but in default upon trust to sell. *Johnson v. Mounsey*, (1879) 11

Convey-
ance upon
trust to
sell.

C. D. 284; *Locking v. Parker*, (1872) 42 L. J. Ch. 257; 8 Ch. 80.

2. A conveyance upon trust to sell in satisfaction of the debt. *Wicks v. Scriven*, (1860) 1 J. & H. 215.

3. A conveyance upon trust to take possession, manage, sell, and pay debts. *Chambers v. Goldwin*, (1801) 5 Ves. 834.

Under such conveyances as the above, there is no such trust as would enable the mortgagor to have the mortgaged property sold, because the discretion to sell is in the mortgagee alone. On the other hand, the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But these distinctions make no substantial difference in his position, which is that of mortgagee. *Kirkwood v. Thompson*, (1865) 2 D. J. & S. 613; *Banner v. Berridge*, (1881) 50 L. J. Ch. 680; 18 C. D. 254.

The frame of these instruments does not bring them in any respect within the principle that the decree of foreclosure proceeds upon. There is no condition the breach of which by the mortgagor works a forfeiture. *Sampson v. Pattison*, (1842) 1 H. 533.

Intention
proved by
circum-
stances.

In spite of the Statute of Frauds, parol evidence of the surrounding circumstances and of the verbally expressed intention of the parties is admissible to show that a conveyance absolute in form was intended as a mortgage; because insisting on the conveyance as absolute when it had been agreed that it should be a mortgage, is a fraud, and the Statute of Frauds is not allowed by Courts of equity to cover fraud. *Lincoln v. Wright*, (1859) 4 De G. & J. 16; *Barton v. Bank of New South Wales*, (1890) 15 A. C. 379.

When the parties intended a mortgage, the omission

of a proviso for redemption is immaterial. *Bell v. Carter, supra.*

If the parties intended an absolute sale, a contemporaneous agreement for a re-purchase not acted upon will not of itself entitle the vendor to redeem. *Barrell v. Sabine*, (1684) 1 Vern. 268; *Mellor v. Lees*, (1742) 2 Atk. 494; *Williams v. Owen*, (1840) 12 L. J. Ch. 207; 5 My. & Cr. 303.

Sale with contract for re-purchase.

The following facts have been held relevant on the question whether the transaction was one of sale or mortgage:—the value of the property as compared with the consideration, and that the vendor was a solicitor (*Williams v. Owen, supra*); the mutuality of the remedies, and their substantial agreement with the rights of mortgagor and mortgagee, payment or demand of interest (*Servier v. Greenway*, (1815) 19 Ves. 413); the recitals in the deed (*Barton v. The Bank of New South Wales, supra*); the continued occupation by the mortgagor (*Lincoln v. Wright, supra*).

Relevant circumstances.

In all cases it is a question of intention, to be inferred from all the circumstances, whether the original transaction was a *bonâ fide* sale with a contract for re-purchase, or a mortgage under the form of a sale. *Primâ facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be a conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase. *Alderson v. White*, (1858) 2 D. & J. 97; *Manchester, Sheffield & Lincolnshire Railway v. North Central Wagon Company*, (1888) 58 L. J. Ch. 219; 13 A. C. 554.

COVENANTS FOR PAYMENT.

The covenants by the mortgagor for payment are threefold, namely, to pay to the mortgagee, first, the principal

Covenants.

sum lent, on a day fixed or on demand; secondly, interest in the meantime; and thirdly, in case of default, then interest until payment of the principal.

Mort-
gagee's
power to
sue.

The mortgagee's power to sue on the covenant is subject to this limitation, namely, every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money; if, therefore, a mortgagee puts it out of his power to reconvey the mortgaged property, he will be debarred from suing on his covenant. *Walker v. Jones*, (1866) 1 P. C. 50.

Action on
the cove-
nant and
foreclo-
sure.

The mortgagee may sue first, and then foreclose the mortgaged property, if he has obtained under his covenant less than what was due to him.

He can foreclose first and then sue, if he has retained possession of the property, and offers to reconvey on payment.

After foreclosure and a sale of the mortgaged property at a sum less than the debt, an injunction was granted to restrain a mortgagee from recovering the difference at law. *Perry v. Barker*, (1803) 8 Ves. 527; *Thornton v. Court*, (1854) 3 D. M. & G. 298.

After foreclosure, a mortgagee cannot sue if he has not retained possession of the property, and is not able to reconvey on payment. *Lockhart v. Hardy*, (1846) 9 B. 349; *Palmer v. Hendrie*, (1859) 27 B. 349; 28 B. 340.

Mort-
gagor's
covenants
are con-
ditional.

When a mortgagor assigns his equity of redemption he loses all right in the property, nevertheless when sued on his covenant he is entitled upon paying his mortgage money to have a reconveyance to himself, subject to any equity of redemption vested in any other person. The obligations between mortgagor and mortgagee are mutual. Upon the mortgagor there is the obligation to pay, but directly he does so there arises in the mortgagee the obligation to give back the property which was the

security for the money. The mortgagee's right to sue is not absolute, but conditional, and the assignment of the equity of redemption does not render absolute a covenant on the part of the mortgagor, which had previously been in equity conditional. *Kinnaird v. Trollope*, (1888) 57 L. J. Ch. 905; 39 C. D. 636.

Inability to reconvey does not prevent a mortgagee from suing, if it arises from the default of the mortgagor. As where, after foreclosure of a leasehold house, it was forcibly taken by the lessors on account of the mortgagor's non-observance of covenants, which the mortgagee was not liable to perform. *Burrell v. Smith*, (1869) 38 L. J. Ch. 382; 7 Eq. 899.

Inability to sue due to mortgagor's default.

In the last-mentioned case it was assumed that destruction of the mortgaged property without negligence by the mortgagee would not prevent him from suing.

On condition of reconveyance on payment, a mortgagee, after foreclosure, can prove for his principal and interest in an administration action of the mortgagor's estate. *Haynes v. Haynes*, (1857) 3 Jur. N. S. 504.

The obligation upon a mortgagee to reconvey the mortgaged property is the same, whether he sues the mortgagor upon a covenant in the deed or on some collateral contract to pay. Where some promissory notes had been given and their payment secured by a mortgage of property, the mortgagee discounted the notes with a third person and assigned to him the mortgaged property. The assignee parted with the property for value and then sued the mortgagor on the notes without giving credit for the price received for the property, but was restrained by injunction on the ground that the relation of mortgagor and mortgagee had been established, also because if an action on the notes were possible the price received for

Collateral contract.

the mortgaged property must be brought into account. *Walker v. Jones, supra.*

Adminis-
tration.

A mortgagee is entitled to administer the mortgagor's estate. *King v. Chick*, (1888) 58 L. J. Ch. 70; 39 C. D. 567.

Liability
of execu-
tors and
benefi-
ciaries.

The Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104), for the first time made the estate of a deceased debtor assets to be administered in a Court of equity for the payment of the debts of the deceased. The liability of the mortgagor's estate, created by the covenant for payment, can be enforced against his executors and administrators to the extent of the assets, even after their distribution, unless there was an active consent or any special equitable circumstances sufficient to disentitle the creditors to complain of the distribution. *Blake v. Gale*, (1886) 55 L. J. Ch. 559; 32 C. D. 571; *Gibbs v. Layland*, (1884) 54 L. J. 640; 26 C. D. 783; *Bowles v. Hyatt*, (1888) 57 L. J. 777; 38 C. D. 609.

The right of a mortgagee to follow the personal estate of a mortgagor into the hands of his residuary legatees is not a legal right, but a purely equitable one, and the Court will not enforce it under circumstances which make it unjust so to do. Therefore as against legatees, after a delay of fourteen years, a claim to make them refund was refused. *Ridgway v. Newstead*, (1860) 30 L. J. Ch. 889.

So, also, after a lapse of twenty years, when the mortgagee had full knowledge of and assented to the distribution of the assets of the mortgagor. *Blake v. Gale, supra.*

Liability
of execu-
tors and
trustees
for mort-
gage.

The executors of a mortgagor should not distribute the estate without making provision for the payment of the mortgage debt, if there is a probability that the mortgaged property will be insufficient. In an action by the mortgagee on the covenant in the mortgage deed the executors of the mortgagor are liable to account for all personal estate received by them and not applied in a due course of

administration, and the devisees, whether in trust or beneficially and a voluntary assignee, as a new trustee are liable to the extent of the real estate, including rents received by them. But while the heir or devisee is, under the Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104), and the authorities construing it, liable to the extent of the rents and profits which he has received, the rents and profits themselves are not liable until judgment. Before judgment the creditors have no charge under the statute against the real estate. *Downe v. Morris*, (1844) 3 H. 394; *Bowles v. Hyatt*, *supra*; *In re Moon*, *Holmes v. Holmes*, [1907] 2 Ch. 304.

The words of the statute with reference to the persons to be sued do not control the express enactment that the real estate should be assets. A lord taking by escheat and a voluntary assignee, though neither heir nor devisee, are liable.

Inability to reconvey does not restrict a mortgagee's power to sue when the property has been sold under a power of sale. For this proposition there seems to be no direct authority, unless *Rudge v. Richens*, (1873) 42 L. J. C. P. 127; 8 C. P. 358, is such a one.

When the loan is payable on demand, the mortgagee must give a reasonable notice to the mortgagor to enable him to find the money. *Toms v. Wilson*, (1862) 32 L. J. Q. B. 382; *Brighty v. Norton*, (1862) 32 L. J. Q. B. 38; *Fitzgerald's Trustee v. Mellersh*, 61 L. J. Ch. 231; [1892] 1 Ch. 385; *Brown v. Brown*, 62 L. J. Ch. 695; [1893] 2 Ch. 300.

In addition to the suspension of the right to sue from inability to restore the deeds or the mortgaged property, the right to sue is merged—

Merger of
covenant.

- (1) In a judgment recovered on the covenant for payment of the same debt. If the covenant for

Judgment
on the
covenant.

payment of interest is not an independent covenant, but ancillary only to the covenant for the payment of principal, it also will be merged in a judgment on the covenant to pay the principal, and a mortgagee in an action to recover interest will, in such a case, receive interest only at the rate allowed by the Court. Judgment on a covenant to pay the principal will not affect a mortgagee's right to interest if the covenant for payment of interest is an independent one, and if in his second action he is not seeking to obtain personal payment but to enforce his security against the mortgaged property. *Re European Central Railway Company*, (1876) 46 L. J. Ch. 57; 4 C. D. 33; *Saunders v. Milsome*, (1866) 2 Eq. 573; *Cook v. Fowler*, (1874) 43 L. J. Ch. 855; 7 H. L. 27; *Goodchap v. Roberts*, (1880) 14 C. D. 49; *Popple v. Sylvester*, (1882) 52 L. J. Ch. 54; 22 C. D. 98; *Ex parte Fewings*, *Re Sneyd*, (1883) 53 L. J. Ch. 545; 25 C. D. 388; *Economic Life Assurance v. Usborne*, 71 L. J. P. C. 34; [1902] A. C. 147.

The inability of the mortgagee to sue on a covenant merged in a judgment gives a mortgagor no right to redeem except upon payment of the whole interest which he has contracted to pay. *Mellersh v. Brown*, (1890) 45 C. D. 225.

Merger.

- (2) When it arises from a simple contract, in a specialty security, if the remedy given by the latter is co-extensive with that which the creditor had upon the former, and no intention against merger is expressed in the specialty. *Twopenny v. Young*, (1824) 3 B. & C. 208; *Norfolk Railway Co. v. McNamara*, (1849) 3 Ex. 628; *Chetwynd v. Allen*, 68 L. J. Ch. 160; [1899] 1 Ch. 353.

In the case of a mortgage to secure the debt of another, the mortgagee, by giving time to the principal debtor, discharges the mortgagor from personal liability (*Bolton v. Buckenham*, 60 L. J. Q. B. 261; [1891] 1 Q. B. 278), and releases his estate (*Wheatley v. Bastow*, (1855) 24 L. J. Ch. 727; 7 D. M. & G. 261; *Hodgson v. Hodgson*, (1837) 2 Keen, 704; *Bolton v. Salmon*, 60 L. J. Ch. 239; [1891] 2 Ch. 48).

Giving
time to
principal.

THE TITLE DEEDS.

The Conveyancing Act, 1881, s. 16, provides as follows:—

“(1) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee’s costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

Power for
mortgagor
to inspect
title deeds.

“(2) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.”

An action in the Chancery Division will lie for a refusal to allow inspection. *Burn v. London & South Wales Coal Company*, (1890) W. N. 209.

It is doubtful if a summons can be taken out for this purpose under the Conveyancing Act.

Deeds deposited to secure the repayment of a loan cannot be recovered by the mortgagor in an action of detinue prior to repayment. *Bank of New South Wales v. O'Connor*, (1889) 58 L. J. P. C. 82; 14 A. C. 273.

The principle that a mortgagee cannot sue upon his covenant except upon condition of performing his part of

the contract by restoring the mortgaged property, applies also where he cannot restore the title deeds of the mortgaged property. The following cases have arisen: Destruction of the title deeds by the mortgagee in a fit of insanity, discovery of the loss after satisfaction of the mortgage and reconveyance of the estate, fraudulent deposit of the deeds with a third party by the mortgagee's solicitor, gross negligence by the mortgagees in the custody of the deeds so that they were injured by water and became undecipherable. The mortgagor under such circumstances is entitled to bring an action in a Court of equity to have his title established, also at the cost of the mortgagees an action to recover the deeds from a third party, also to an indemnity and to compensation limited to actual loss without taking into account speculative damage on a future sale of the mortgaged property. The form of the decree in *Hornby v. Matcham* seems to indicate that the mortgagor's compensation is limited to the sum due on the mortgage. If this is so, then in a case where the facts showed negligent or improper conduct in the mortgagee which would be actionable in a bailee of goods and a loss exceeding the amount of the mortgage debt the mortgagor would only recover complete satisfaction by an action at law after payment. There seems to be no reported decision in which such a claim has been established. *Lord Middleton v. Eliot*, (1847) 15 Sim. 581; *Hornby v. Matcham*, (1848) 16 Sim. 325; *Baskett v. Skeel*, (1863) 11 W. R. 1019; *Bentinck v. Willink*, (1842) 2 H. 1; *Brown v. Sewell*, (1853) 11 H. 49; *James v. Rumsey*, (1879) 48 L. J. Ch. 345; 11 C. D. 398.

Damages
for loss of
deeds.

Before payment of the mortgage debt no action at law lies for loss or injury to the deeds. *Gilligan and Nugent v. National Bank*, [1901] 2 Ir. R. 513.

Apparently a mortgagee would not be liable to make compensation if he proved that the loss of the deeds was not due to any fault of his own. *Woodman v. Higgins*, (1850) 14 Jur. 846; *Smith v. Bicknell*, (1814) 3 V. & B. 51.

If there is a prospect that the deeds will eventually be recovered by the mortgagee, the mortgagor may be ordered to pay his money into Court, to remain until the title deeds are secured and a reconveyance can be had. *Schoole v. Sall*, (1803) 1 Sch. & Lef. 176.

In a case where the first mortgagee had lost the first mortgage and some policies of insurance, a part of the subject-matter of the mortgage, the Court directed an indemnity to be given to the second mortgagees, together with their costs of the inquiry as to the loss and of the bond, and also the retention of a sum in Court to meet possible future costs. *Caldwell v. Matthews*, W. N. (1890) 84; 62 L. T. 799.

Indemnity.

Upon payment off the mortgagee must deliver to the mortgagor all deeds and writings in his possession or custody relating to the mortgaged property. He cannot retain copies even though made at his own expense. *Re Wade and Thomas*, (1881) 50 L. J. Ch. 601; 17 C. D. 348.

Return of deeds on payment off.

The Court may on foreclosure direct a puisne mortgagee to hand over to the first mortgagee deeds affecting the title prior to the date of the first mortgage, but the first mortgagee is not entitled to have delivered to him a deed which deals only with the equity of redemption. *Greene v. Foster*, (1882) 52 L. J. Ch. 470; 22 C. D. 566.

On foreclosure.

PAYMENT.

A mortgagor, desirous of paying off the mortgage money, should pay it to the mortgagee or to some person authorized by him to receive the principal money secured by the mortgage. Such an authority cannot be implied Authority.

from (1) the position of solicitor to the mortgagee; (2) an authority to receive the interest; (3) possession of the deeds. *Withington v. Tate*, (1869) 4 Ch. 288; *Simmins v. Shirley*, (1877) 46 L. J. Ch. 875; 6 C. D. 173; *Ex parte Swinbanks*, (1879) 48 L. J. Bk. 120; 11 C. D. 525; *Gordon v. James*, (1885) 30 C. D. 249; *London Freehold and Leasehold Property Company v. Baron Suffield*, 66 L. J. Ch. 790; [1897] 2 Ch. 608.

Receipt in
deed or
indorsed.

Production by a solicitor of a receipt in a deed or indorsed on it, is sufficient authority to give the money to the solicitor if the deed or receipt has been signed by a person entitled to give a receipt for the money. Conveyancing Act, 1881, s. 56; the Trustee Act, 1888, s. 2 (1); *Re Bellamy and Metropolitan Board of Works*, (1888) 52 L. J. Ch. 870; 24 C. D. 387; *Re Flower and Metropolitan Board of Works*, (1884) 53 L. J. Ch. 955; 27 C. D. 592; *Day v. Woolwich Equitable Building Society*, (1888) 58 L. J. Ch. 280; 40 C. D. 491.

The mortgagor must make sure that the person producing the receipted deed is a solicitor. In the absence of anything to suggest the contrary, it seems that the person paying the money may, and indeed is, bound to assume that a solicitor producing the deed is acting as solicitor for the person having power to give a discharge. Hood and Challis on the Conveyancing Acts, 5th ed. p. 138, quoted with approval in *King v. Smith* 69 L. J. Ch. 598; [1900] 2 Ch. 425.

Implied
by autho-
rity to
enforce
payment.

An authority in the mortgagee's solicitor to receive the principal may be inferred when he has been instructed to take legal proceedings to recover it. *Bourton v. Williams*, (1870) 39 L. J. Ch. 800; 5 Ch. 655.

Should the covenant for payment or proviso for redemption provide for payment, on the day fixed, to the mortgagee, his heirs, executors, and administrators, and the

mortgagee die before that day, a payment on that day to the heir by the mortgagor is good, and the heir holds the money as trustee for the personal representative. *Thornborough v. Baker*, (1675) 3 Sw. 628; *Kendall v. Micfield*, (1740) Barnardiston, 46.

When money has been advanced after the 31st of December, 1881, by more than one person, jointly and not in shares, the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor, is a complete discharge for all moneys for the time being due. This section applies only if and so far as a contrary intention is not expressed in the mortgage. The Conveyancing Act, 1881, s. 61; *Smith v. Sibthorpe*, (1887) 56 L. J. Ch. 593; 34 C. D. 732.

When the money has been advanced prior to December, 1881, repayment cannot be safely made by a mortgagor to a survivor without the concurrence of the personal representative of the deceased. Payment to one of joint mortgagees during the other's lifetime, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest, if any, even though the payee ultimately becomes the survivor in the joint account. *Lake v. Craddock*, 1 L. C. Eq. 5th ed. 208; *Nicholson v. Revill*, (1836) 4 A. & E. 675; *Matson v. Dennis*, (1864) 4 D. J. & S. 345; *Vicars v. Cowell*, (1839) 1 B. 529; *Steeds v. Steeds*, (1889) 58 L. J. Q. B. 537; 22 Q. B. D. 537; *Powell v. Brodhurst*, 70 L. J. 587; [1901] 2 Ch. 160.

The receipt in writing of a mortgagee is a sufficient discharge for any money arising from the power of sale conferred by s. 22 of the Conveyancing Act, 1881, or for any money or securities comprised in his mortgage or arising thereunder, and a person paying or transferring the same to the mortgagee is not concerned to inquire

Effect of
advance
on joint
account.

Receipt in
writing
of mort-
gagee.

whether any money remains due under the mortgage. Conveyancing Act, 1881, s. 22, sub-s. 1. Under this section trustees of a mortgaged fund are safe in paying the money to the mortgagee, but they are not obliged to accept his discharge if there are doubts or difficulties which make it reasonable for them to desire a discharge from the Court. *In re Bell, Jeffrey v. Sayles*, 65 L. J. Ch. 188; [1896] 1 Ch. 1; *Hockey v. Western*, 67 L. J. Ch. 166; [1898] 1 Ch. 350.

Payment
before
date fixed.

Payment before the time fixed is good if accepted by the mortgagee. *Burgayne v. Spurling*, (1633) Cro. Car. 283; *Burrough v. Cranston*, (1840) 2 Ir. Eq. Rep. 203.

Tender.

An action to redeem based on tender before the time fixed and refusal by the mortgagee is bad (*Brown v. Cole*, 14 S. 427; *Burrowes v. Molloy*, (1845) 2 J. & L. 521), unless a date has been fixed so distant as to be prohibitory of redemption. *Northampton v. Pollock*, (1890) 45 C. D. 190; 61 L. J. Ch. 49.

Time of
payment.

Payment may also be made at any time after the date fixed—

(1) On giving six months' notice to the mortgagee. *Browne v. Lockhart*, (1840) 10 S. 424.

(2) On tendering six months' interest in lieu of notice. *Johnson v. Evans*, (1889) 61 L. T. 18; *Smith v. Smith*, 60 L. J. Ch. 694; [1891] 3 Ch. 550.

Proceed-
ings to
recover
money;
waiver of
interest.

No notice by the mortgagor or payment of interest in lieu of notice is required if the mortgagee has demanded payment of the debt or taken steps to compel payment. In such a case a mortgagee cannot refuse a tender of principal and interest up to date and costs. The rule applies though the time fixed for payment has not expired. Entry into possession of the mortgaged property by the mortgagee is in effect a demand for payment. *Letts v.*

Hutchings, (1879) 13 Eq. 176; *Prescott v. Phipps*, (1883) 23 C. D. 372; *Banner v. Berridge*, (1881) 50 L. J. Ch. 630; 18 C. D. 254; *Borill v. Endle*, 65 L. J. Ch. 543; [1896] 1 Ch. 648.

If a grantee of a bill of sale given to secure the repayment of a loan with interest takes possession of the goods in order to enforce his security by a sale, he cannot refuse a tender of principal and interest up to date and costs. If he sells interest stops at the date of sale, and even if the debt is payable by instalments and a sale ordered by the Court under Order LVII. r. 12, the lender receives the balance of his debt with interest at the agreed rate, but only up to the date of such payment. *Foster v. Clowser*, [1897] 2 Q. B. 362; *Ex parte Wickens*, 67 L. J. Q. B. 397; [1898] 1 Q. B. 543; *Ex parte Ellis*, 67 L. J. Q. B. 734; [1898] 2 Q. B. 79; *West v. Diprose*, 69 L. J. Ch. 169; [1900] 1 Ch. 337.

Bringing a foreclosure action is a waiver by the mortgagee of his right to six months' interest in lieu of notice, therefore at any time up to judgment a mortgagor can stop a foreclosure action by paying the costs and the principal money with interest up to date. After judgment, the judgment and the certificate settle the rights of the parties, and the mortgagor is not entitled to redeem, before the expiration of the time fixed, on payment of a less sum than that named in the certificate. *Hill v. Rowlands*, 66 L. J. Ch. 689; [1897] 2 Ch. 361.

A mortgagee of a reversionary interest who applies for and obtains payment of his debt when the reversion falls into possession, may be held disentitled to any interest on the ground that he had taken active steps to compel payment. *Smith v. Smith*, *supra*.

Reversionary
interest.

Default after notice to pay off makes necessary six Default.

months' notice or another six months' interest (*Bishop v. Church*, (1751) 2 Ves. sen. 371; *Bartlett v. Franklin*, (1867) 15 W. R. 1077), unless the money is in Court, and the mortgagees have consented to the jurisdiction; then they receive interest only for the period of delay. *Day v. Day*, (1862) 31 B. 270; *Levy v. Sewill*, (1885) 31 C. D. 90.

Equitable
mort-
gagee.

An equitable mortgagee by deposit of deeds is not entitled to six months' notice, nor to six months' interest in lieu of notice, unless the fair inference from the facts is, that the parties intended a permanent transaction, and that the mortgagee should have the usual time in which to find a new investment. *Fitzgerald's Trustee v. Mellersh*, 61 L. J. Ch. 231; [1892] 1 Ch. 385.

Stock
mortgage.

In the case of a mortgage of stock, it is the mortgagor's right, on repayment, to recover the specific stock which he transferred by way of mortgage. *Langton v. Waite*, (1868) 6 Eq. 165.

A covenant to transfer into the name of the mortgagee the same amount of investments as he sold out to raise the money for the loan, gives the mortgagee, when he sells, no right to retain more than the price of the stock on the day of the loan, though the stock may have fallen in value since then. *Blyth v. Carpenter*, (1866) 2 Eq. 501.

After
re-pay-
ment.

After repayment, if no conveyance has been executed, the mortgagee becomes a trustee for the persons interested in the equity of redemption. *Cholmondeley v. Clinton*, (1820) 2 J. & W. 186.

When the money due upon a mortgage has been paid to the mortgagee, but no reconveyance has been executed, the mortgagor becomes from the date of such payment a tenant at will to the mortgagee, and the legal estate of the mortgagee is extinguished by thirteen years' adverse

possession of the mortgagor. The 25th section of the Statute of Limitations (3 & 4 Will. IV. c. 27) relates to express trusts only, and does not apply to the relations between a mortgagee, whose mortgage has been satisfied, and the mortgagor. *Sands to Thompson*, (1888) 52 L. J. Ch. 406; 22 C. D. 614; *Warren v. Murray*, 64 L. J. Q. B. 42; [1894] 2 Q. B. 648.

The omission of a covenant for repayment in a deed may be evidence that the transaction is a conditional sale, but where a mortgage is clearly intended it raises a question whether it was the intention of the parties that there should be any personal liability on the mortgagor. *King v. King*, (1735) 3 P. Wms. 358. Omission of covenant.

If there has been a previous loan to the mortgagor which he was personally liable to repay, it is unlikely that the mortgagee intended to give up his personal remedy; it is more probable that he intended to get an additional security. *Yates v. Aston*, (1843) 4 Q. B. 182; *Reynolds v. Wheeler*, (1861) 10 C. B. 561; *Holmes v. Bell*, (1841) 8 M. & G. 213; *Norfolk Rail. Co. v. McNamara*, (1849) 3 Ex. 628. A previous loan.

This is obviously so where in a mortgage deed there is an unequivocal acknowledgment of indebtedness not introduced as a recital to explain the deed, but without any other object except an admission of indebtedness. *Courtney v. Taylor*, (1843) 6 Man. & G. 851; *Marryatt v. Marryatt*, (1860) 28 B. 224; *Holland v. Holland*, (1869) 4 Ch. 449; *Kidd v. Boone*, (1871) 12 Eq. 89; *Blackburn v. Dickson*, (1871) 12 Eq. 154; *Saunders v. Milsome*, (1866) 2 Eq. 573. Admission of indebtedness.

A. B. purchased with his own money, on behalf of a company, property the acquisition of which was *ultra vires*, and he and the company joined in a conveyance upon trust to sell and pay A. B. A recital that A. B. had Acknowledgment for collateral purpose.

purchased on behalf of the company, and with the concurrence of the board of directors, did not constitute a contract by the company to repay. *Jackson v. North Eastern Rail. Co.*, (1877) 7 C. D. 573.

An admission by a defaulting trustee, in a mortgage of his own property to indemnify against his defaults, that he had in his hands a large sum belonging to the trust estate, and a proviso for redemption, did not make the liability under the breach of trust a specialty debt. *Isaacson v. Harwood*, (1868) 3 Ch. 225.

Recitals under such circumstances are by way of narrative to explain the deed, and need have no further object such as an admission of indebtedness.

Loan and mortgage deed, the same transaction.

When the loan and the mortgage deed omitting a covenant for repayment are part of the same transaction, it is at least arguable that the deed contains all the terms of the agreement, and that the borrower would not have entered into the loan except upon condition that there should be no personal liability, and the lender was content to rely only on the mortgaged property. But see *King v. King*, *supra*, where a contrary inference was drawn.

No personal benefit to borrower.

The case would be strengthened if the borrower obtained no personal benefit from the loan, as a guardian mortgaging the property of his ward, or if the lender had no knowledge of or made no inquiry about the ability or circumstances of the borrower. Upon consideration of the evidence in the case the Court came to the conclusion that the mortgagors, though trustees, had undertaken a personal liability, in spite of the omission of a covenant. *Barnes v. Glenton*, 68 L. J. Q. B. 502; [1899] 1 Q. B. 885.

West Indian mortgage.

The mortgagees were, under the circumstances, held entitled to sue, where the mortgage was on land in Bar-

badoes, omitting a covenant for payment. *Gibbs v. Young*, The Times, 18 and 19 Nov. 1889.

The Court refused to authorize a committee to enter into a covenant on behalf of the lunatic where the committee had declined to enter into a personal covenant, but there is jurisdiction to give such an authority in a proper case. *Re Fox*, (1886) 33 C. D. 37; *Re Ray*, [1896] 1 Ch. 468; Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 124.

Com-
mittee of
lunatic.

Where a deed contains a covenant to pay principal and interest by a fixed day, and no covenant to pay subsequent interest, a mortgagee will recover in an action on the covenant damages for non-payment after the day fixed, and those damages will be measured by the rate of interest mentioned in the deed, or if it was more than the rate allowed by the Court, by that rate, and interest by way of damages calculated at the same rate would be allowed to a mortgagee in an action of redemption or foreclosure. *Cook v. Fowler*, (1874) 7 H. L. 27; *Goodchap v. Roberts*, (1880) 14 C. D. 49; *Mellersh v. Brown*, (1890) 60 L. J. Ch. 43; 45 C. D. 225.

Omission
of cove-
nant for
subse-
quent
interest.

From a covenant or agreement by the mortgagor to pay the principal and by the mortgagee to reconvey on payment of principal, without in either case any mention of interest, an intention may be inferred that interest should not be payable, but that inference can be rebutted by other parts of the document or memorandum. *Thompson v. Drew*, (1856) 20 B. 49; *Ashwell v. Staunton*, (1863) 30 B. 32.

An equitable mortgage by deposit without memorandum carries interest at four per cent. *Ashton v. Dalton*, (1846) 2 Coll. 565; *Carey v. Doyne*, (1856) 5 Ir. Ch. Rep. 104; *Kerr's Policy*, (1869) 8 Eq. 331; *Lippard v. Ricketts*, (1872) 14 Eq. 291.

Interest
on equit-
able mort-
gage.

The interest on mortgages is usually made payable

Interest
accrues

from day
to day.

half-yearly for the sake of convenience and by arrangement, but in fact it becomes due *de die in diem*. The half-year's interest is not one entire thing, but the aggregate of the interest which has arisen during the half-year. The practice is to treat interest which arises during the life of a mortgagee testator as so much capital as between the tenant for life and remainderman. *In re Roger's Trust*, (1861) 30 L. J. Ch. 153.

An equitable mortgage by deposit with a written agreement to pay principal and interest on a fixed date, but no mention of subsequent interest, raises the question whether the money was intended to be repaid at the date fixed, and that for this reason no provision was made for subsequent interest, or whether the date was fixed arbitrarily, as in an ordinary mortgage, and the intention was that interest should be paid at the same rate after as before. *Ex parte Furber, In re King*, (1881) 17 C. D. 191.

TENDER.

Tender.

A tender must be of the full amount due for principal, interest, and costs in legal currency, unless the mortgagee waives legal tender. *Sentance v. Porter*, (1849) 7 H. 426; *Rhodes v. Buckland*, (1852) 16 B. 212. It must be made by a person having, at least, a *prima facie* right to redeem to the mortgagee, or an agent entitled on his behalf to receive payment. *Pearce v. Morris*, (1869) 5 Ch. 227.

By person
entitled to
redeem.

Tender by cheque even of the full amount due is insufficient. An authority to an agent to accept a tender means an authority to accept a tender according to law. *Blumberg v. Life Interests and Reversionary Securities Corporation*, 66 L. J. Ch. 127; [1897] 1 Ch. 171.

Uncondi-
tional.

A tender must be unconditional, but may be under protest. *Scott v. Uxbridge and Rickmansworth Rail Co.*,

(1866) 1 C. P. 596; *Greenwood v. Sutcliffe*, 61 L. J. Ch. 59; [1892] 1 Ch. 1.

The remedies of a mortgagor against a mortgagee who improperly refuses a proper tender are— Improper refusal.

(1) An action for redemption, in which, according to the circumstances, the mortgagee may be refused by the Court his costs, or even, in extreme cases, ordered to pay costs: see p. 280.

(2) A summary application to the Court for an order that the deeds should be returned on the terms of substituting for the security a sum of money equal to the amount secured with a proper margin. *Bank of New South Wales v. O'Connor*, 58 L. J. P. C. 82; 14 A. C. 273.

A mortgagee refuses a proper tender at his own risk, so that a tender properly made and improperly rejected not only makes a mortgagee liable for costs, but also stops interest if the money is paid into Court or kept always ready to pay over to the mortgagee. Such a tender is not equivalent to payment, nor is a refusal to accept such a tender a breach of covenant for which an action at law will lie. *Gyles v. Hall*, (1726) 2 P. Wms. 377; *Harmer v. Priestley*, (1853) 16 B. 569; *Bank of New South Wales v. O'Connor*, *supra*; *Kinnaird v. Trollope*, (1888) 42 C. D. 610. Interest stopped.

If a mortgagee refuses to reconvey or stop a sale unless a tender is made to him of a sum in excess of what is due to him, the sum so extorted may be recovered in an action at law as money had to the mortgagor's use. *Close v. Phipps*, (1844) 7 M. & G. 586; *Fraser v. Pendlebury*, (1861) 10 W. R. 104. Excessive demand by mortgagee.

CONSIDERATION.

The production of the security stating payment is sufficient proof of it, unless the fact of payment has been Proof of consideration.

disputed on the pleadings. *Minot v. Eaton*, (1826) 4 L. J. Ch. 134; *Pidduck v. Brown*, (1734) 3 P. Wms. 289.

To whom
paid.

On an advance of money the mortgagee must pay it to the mortgagor or to his agent in fact authorized to receive the money, or to his solicitor, producing a receipted deed under sect. 56 of the Conveyancing Act, 1881. *Day v. Woolwich Society*, (1888) 58 L. J. Ch. 280; 40 C. D. 491.

Conclu-
sive state-
ment.

No statements in the mortgage, however definite as to the consideration, are conclusive between the original mortgagee and the mortgagor or those claiming under him, especially where there has been a fiduciary relation or circumstances indicating duress. *Wall v. Cockerell*, (1860) 11 W. R. 442; 10 H. L. C. 229; *Vandeleur v. Blagrave*, (1843) 6 B. 565; *Hartley v. Russell*, (1825) 2 S. & S. 244.

A solicitor taking a security from his own client cannot rely on any statement in the instrument as to the amount paid by him, but must prove it by independent evidence. *Lewes v. Morgan*, (1817) 5 Price, 42; *Gresley v. Mousley*, (1861) 3 De G. F. & J. 433.

An assignee for value of the mortgage debt in the absence of any circumstances to arouse suspicion is entitled to rely on a statement in the deed acknowledging the receipt of the full amount of the mortgage money. *Bickerton v. Walker*, (1885) 31 C. D. 151; *Bateman v. Hunt*, 73 L. J. K. B. 782; [1904] 2 K. B. 530.

Bonus.

It is permissible to state as the consideration a larger sum than has actually been advanced, if it can be shown that this was done with the full consent of the mortgagor as a reasonable bonus to the mortgagee for an unusual risk. *Potter v. Edwards*, (1857) 26 L. J. Ch. 468; *Mainland v. Upjohn*, (1889) 41 C. D. 126; *Northampton v. Pollock*, (1890) 45 C. D. 190; see also p. 214.

LOCKE KING'S ACTS.

Prior to the statutes known as Locke King's a mortgage debt was, on the death of a mortgagor, like all other debts, payable in the first place out of the personal estate of the mortgagor. Locke
King's
Acts.

As to any testator or intestate dying after the 31st December, 1877, seised of or entitled to any land or other hereditaments of whatever tenure which should at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money, the devisee, legatee, or heir is not entitled to have any such sum or sums discharged or satisfied out of the personal estate or any other real estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of these Acts by his will, deed or other document have signified a contrary intention; but the land so charged shall as between the different persons claiming through or under the deceased person be primarily liable. Every part thereof according to its value bearing a proportionate part of the mortgage debts charged thereon. Such contrary intention must be declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

Such a contrary intention is not deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate, nor by a general direction that all the debts of a testator shall be paid out of his personal estate, unless the debt thrown on the personal estate shall be referred to expressly or by necessary implication. The Real Estates Charges Acts (Locke King's Acts), 17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69, 40 & 41 Vict. c. 34.

Contrary
intention.

The following cases have been held to contain no contrary intention:—

- (1) A testator, nearly the whole of whose real estate was subject to a mortgage, devised a part of his real estate to his sons, charged, nevertheless, in aid of his personal estate and in exoneration of his other real estate with the payment of all his just debts. *In re Newmarch, Newmarch v. Star*, (1878) 9 C. D. 12.
- (2) A testator directed his executors to pay all his just debts, funeral and testamentary expenses out of his personal estate in exoneration of his real estate. *In re Rossiter, Rossiter v. Rossiter*, (1879) 13 C. D. 355.
- (3) A testator made a mixed fund of real and personal estate and directed payment out of it of his debts, including mortgage debts on certain specified estates; the devisees of the residue were held to have no claim for payment out of the personalty of a mortgage debt on the residue. *Elliott v. Dearsley*, (1880) 16 C. D. 323.

In the following cases such an intention has been inferred from:—

- (1) A direction that trade debts should be paid out of the residue, in favour of a devisee of real estate, the deeds of which were, after the date of the will, deposited to secure a trade debt. *In re Fleck, Colston v. Roberts*, (1888) 37 C. D. 677.
- (2) The circumstance that a reversioner of a sum of consols subject to two life estates on a transfer to him by the trustees, conveyed an estate to them to secure the retransfer if it should ever be required. *In re Campbell, Campbell v. Campbell*, [1893] 2 Ch. 206.

- (3) A direction to pay debts except mortgage debts, if any, on Blackacre. There were other mortgage debts. *In re Valpy, Valpy v. Valpy*, 75 L. J. Ch. 301; [1906] 1 Ch. 531.

If a property contracted to be purchased has been left unpaid for, and if the vendor's lien has been excluded, as by express agreement in the contract of purchase, the case would not come within the Acts, and the devisee or heir would not be prevented by them from claiming to have the payment made out of the personal estate. *Broadbent v. Groves*, (1883) 24 C. D. 94.

Devise of realty without a vendor's lien.

These Acts extend to leaseholds (*Drake v. Kershaw*, (1888) 37 C. D. 674); but not to personal property not "lands and hereditaments" as to which the specific legatee is entitled to have the legacy freed from any charge upon it (*Bothamley v. Sherson*, (1875) 20 Eq. 304; *Martin v. Martin*, [1893] 1 Ch. 188).

Leaseholds.

The devisee of mortgaged property is under no personal liability to pay the mortgage debt; the mortgagee's remedy is against the estate of the mortgagor. *Syer v. Gladstone*, (1885) 30 C. D. 614.

On the death of the devisee of mortgaged property, his personal estate was even before the passing of Locke King's Acts under no liability to pay the mortgage debt in exoneration of the real estate of the devisee, for it never was his personal debt. *Waring v. Ward*, (1802) 7 Ves. 332.

CONTRIBUTION.

Rateable contribution is the rule when two or more properties are a common fund for payment of the same debt. *Dunlop v. Dunlop*, (1882) 21 C. D. 583.

Contribution.

By appropriate words it may be provided not only that one security is secondary as between the mortgagors,

Secondary security.

but that the mortgagee cannot resort to one security until the other is exhausted. *Leonino v. Leonino*, (1879) 48 L. J. Ch. 217; 10 C. D. 460.

Such an intention may be implied from the surrounding circumstances. *Marquis of Bute v. Cunynghame*, (1826) 2 Russ. 275.

The mere use of the words "collateral security," or the fact that one security is subsequent in date to the other, and is described as collateral, will not prove such an intention as between those who take different properties from the same mortgagor. *Lipscomb v. Lipscomb*, (1868) 7 Eq. 501; *De Rochefort v. Dawes*, (1871) 12 Eq. 540; *Athill v. Athill*, (1880) 16 C. D. 211.

Real and personal property mortgaged together bear the debt rateably in the hands of the real and personal representatives. *Hall v. Heward*, (1886) 55 L. J. Ch. 604; 32 C. D. 430.

Fund of a fluctuating character.

A fund with income of a fluctuating character, which is one of mortgaged properties, contributes towards the discharge of the mortgage according to its actual income *de anno in annum*. *Ley v. Ley*, (1868) 6 Eq. 174.

No contribution in favour of stranger to mortgage contract.

The cases mentioned below seem to show that although the owner of one of two or more properties subject to a common mortgage would be entitled to contribution if called upon to pay, yet there is no equity to reduce the amount of a liability which has been included in a common mortgage by the creditor to secure his own indebtedness. A policy of assurance contained a proviso that in case of the death of the assured by his own act it should be void except to the extent of any interest acquired therein by actual assignment for valuable consideration. The assured assigned the policy with other securities to secure a debt. On his death by suicide, the Assurance Company urged that they were

entitled to have the debt paid by the other securities or at least borne rateably, but this claim was rejected. *The Solicitors and General Life Assurance Co. v. Lamb*, (1864) 33 L. J. Ch. (N. S.) 426; *City Bank v. Sovereign Life Assurance Co.*, 50 L. T. 565.

The result is the same under a similar proviso if the assurance office is the lender although the office may be otherwise fully secured. *White v. British Empire Mutual Life Assurance Co.*, (1868) 7 Eq. 394.

CHAPTER II.

SUBJECT-MATTER OF MORTGAGE.

The conveyance. THE rules of construction regarding the conveyance of property by way of mortgage do not differ from those relating to a conveyance on a sale.

Recitals. An intending mortgagor, owner in fee of one moiety of a house, and possessed of a lease of the other moiety, after reciting in the mortgage deed that he was entitled in fee to the house, conveyed all his estate and interest in the house by words applicable only to a freehold interest. It was held that the recitals did not control the operative part of the conveyance, and that nothing passed but the freehold interest in the single moiety. *Francis v. Minton*, (1867) 36 L. J. C. P. 201; L. R. 2 C. P. 543.

Trade fixtures in mortgages by sub-demise. Words which, in a conveyance in fee by way of mortgage, are sufficient to pass trade fixtures the property of the mortgagor will have the same effect when the mortgage is of leasehold property by sub-demise; but in the latter case, the absolute property in such fixtures as separate chattels, with the right to remove and sell, will not pass to the mortgagee, unless an intention to that effect is apparent on the deed. *Southport and West Lancashire Banking Co. v. Thompson*, (1887) 57 L. J. Ch. 114; 37 C. D. 64, explaining *Hawtry v. Butlin*, (1873) L. R. 8 Q. B. 290.

Extent of debts secured. The owner of property, if he is so minded, may mortgage it not only for his own debt, but for the debt of anybody else he pleases.

It is a question of construction on the deed. A

mortgage by W. to secure a sum due from him, and also all sums due from W., his executors, administrators, or assigns, covered an advance made to his administrator, who was also his devisee. The words "executors and administrators" alone might have referred to a debt contracted by W., but which, owing to his death, had become due from his executors or administrators. *Smith v. Watts*, (1882) 52 L. J. Ch. 209; 22 C. D. 1.

The validity of an assignment for value of after-acquired property, whether described specifically or in general words, is the same in a conveyance by way of mortgage as in an absolute conveyance, such as a marriage settlement. *Holroyd v. Marshall*, (1862) 10 H. L. C. 211; *Coombe v. Carter*, (1887) 56 L. J. Ch. 981; 36 C. D. 348; *Tailby v. The Official Receiver*, (1888) 58 L. J. Q. B. 75; 13 A. C. 523; *In re Turcan*, (1888) 58 L. J. Ch. 101; 40 C. D. 5; *In re Kelcey*, *Tyson v. Kelcey*, 68 L. J. Ch. 742; [1899] 2 Ch. 580.

After-
acquired
property.

Until foreclosure, a mortgagor of an advowson, even in spite of an express agreement to the contrary, has a right in equity to nominate to the living on a vacancy. *Mackenzie v. Robinson*, (1747) 3 Atk. 559.

Advow-
son.

The reason is, that as it would be simoniacal to sell the presentation, the mortgagee could not bring the value into the account with the mortgagor, and equity will not allow a mortgagee to take out of his security anything for which he cannot account in reduction of his principal, interest, and costs.

If the mortgagee presents, the resignation of his presentee can be compelled at the instance of the mortgagor, if the action is commenced within six months after the death of the last incumbent. *Gardiner v. Griffith*, (1726) 2 P. Wms. 404.

It is immaterial that the vacancy has occurred during

the pendency of a foreclosure action. *Amhurst v. Dawling*, (1700) 2 Vern 401.

Pensions. The full or half pay or retired pay of officers and the pay or pensions of public servants cannot as a rule be mortgaged. They have generally been made incapable of assignment by the words of the statutes under which they have been granted. Also assignments are invalid of payments made for the dignity of the State or for the decent support of those who are engaged in the service of the State, or can be called upon for further service if required. The Army Act, 1881 (44 & 45 Vict. c. 58), s. 141; *Lucas v. Harris*, (1886) 18 Q. B. D. 127.

Benefices. All charges on "benefices and other ecclesiastical livings with cure" and on allowances made to retiring incumbents are void. 13 Eliz. c. 20; Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44); *Gathercole v. Smith*, (1881) 17 C. D. 1.

Allowances granted to incumbents on the union of parishes can be mortgaged if the Order in Council made in pursuance of the Act grants an alienable provision by way of compensation. The Union of Benefices Act, 1860 (23 & 24 Vict. c. 142); *McBean v. Deane*, (1885) 30 C. D. 520.

Sums granted to the committee of a lunatic, or for the maintenance of an infant or for alimony, are not assignable. *Weld v. Blundell*, (1882) 20 C. D. 451; *In re Robinson*, (1884) 27 C. D. 160.

The income of a fellowship to which no duty is attached, and of a canonry without cure can, be assigned. *Grenfell v. Dean and Chapter of Windsor*, 2 B. 544; *Feistel v. King's College*, 10 B. 491.

ACCRETIONS.

**Accre-
tions.**

All benefits and additions to the mortgaged property made by the original mortgagor, or by an assignee of the

equity of redemption, enure to the benefit of the prior mortgagees, whose security is to that extent increased. *Leigh v. Burnett*, (1885) 54 L. J. Ch. 757; 29 C. D. 231; *Landowners, West of England v. Ashford*, (1881) 50 L. J. Ch. 276; 16 C. D. 411.

When a goodwill attaches to a house and would pass to a purchaser, it may be considered as an accretion. Goodwill.

When mortgaged property is taken by a railway company under compulsory powers, the amount apportioned for loss of profits in carrying on the business belongs to the mortgagee. *Pile v. Pile*, (1876) 45 L. J. Ch. 841; 8 C. D. 36.

But a mortgagee is not entitled to a goodwill which is not attached to the mortgaged property, but personal to the man whose skill and whose name have acquired that goodwill. *Cooper v. Metropolitan Board of Works*, (1883) 53 L. J. Ch. 109; 25 C. D. 472.

A renewal of a lease by a person interested in the old lease is *prima facie* an accretion, and is subject to any mortgage or equity redemption to which the old lease is liable. See page 47. Renewal of lease.

Moneys paid under the Licensing Act, 1904, for compensation for the license of a mortgaged public-house belongs to the mortgagee as part of the mortgage security. If the mortgage is vested in trustees for the debenture holders of a limited company the compensation money must be applied in accordance with the provisions of the trust deed. *Law Guarantee and Trust Society v. Mitcham and Cheam Brewery Co.*, 75 L. J. Ch. 553; [1906] 2 Ch. 98; *Noakes v. Noakes & Co.*, [1907] 1 Ch. 64; *Dawson v. Braime's Tadcaster Breweries, Limited*, [1907] 2 Ch. 359. Compensation under Licensing Act, 1904.

By the pledge of a thing, not only the thing itself is pledged, but also, as accessory, the natural increase Natural increase.

thereof. As if a flock of sheep are pledged, the young, afterwards born, are also pledged. The Roman Law adopted this doctrine in its fullest extent: "grege pignori obligato, quæ postea nascuntur, tenentur. Sed et si capitibus decedentibus totus grex fuerit renovatus, pignori tenebitur." Story on Bailments, s. 292.

As regards the liability of the natural increase of property which is a security for money lent, there would seem to be no distinction between a pledge and a mortgage. When a certain number of branded sheep and herds of cattle on a run in the colony of New South Wales were mortgaged, it was held that the mortgage included the produce of the specified sheep, but not any sheep afterwards brought upon the run though in substitution of those specified. *Webster v. Power*, (1868) 37 L. J. P. C. 9; 2 P. C. 69.

Growing
crops.

A mortgagee of land taking actual possession of the land before the severance of the growing crops has the right to sever and take the crops. *Liverpool Marine Credit Company v. Wilson*, (1872) 41 L. J. Ch. 798; 7 Ch. 507; *Bagnall v. Villar*, (1879) 48 L. J. Ch. 695; 12 C. D. 812.

FIXTURES.

Mort-
gagee's
right
against
true
owner

Fixtures not the property of the mortgagor pass to the mortgagee as incident to a mortgage of land in the absence of any circumstance from which it may be inferred that the mortgagee gave an express or implied permission to remove them. *Hobson v. Gorringe*, 66 L. J. Ch. 114; [1897] 1 Ch. 182.

When a mortgagee permits the mortgagor to remain in possession and to let the land, the circumstances of the particular case may raise a presumption that he has authorized the erection of ordinary trade fixtures by the

tenant, and their removal during the tenancy, before the mortgagee enters into possession. *Saunders v. Davis*, 15 Q. B. D. 218; *Cumberland Union Banking Co. v. Maryport*, 61 L. J. Ch. 227; [1892] 1 Ch. 415; *Gough v. Wood*, 63 L. J. Q. B. 564; [1894] 1 Q. B. 718.

The same presumption may be made when the fixtures have been erected by a mortgagor in possession in the ordinary course of his business.

The reasons which have induced a relaxation of the law between landlord and tenant do not apply where the parties who affix the machinery are themselves the owners of the soil.

Mortgagor's right to remove.

A gas engine was let under an agreement of hire and purchase to a builder, for the purpose of being used on land of which the builder was owner in fee. The mode of attachment was by bolts to iron plates set in a concrete bed. After the erection of the engine, the builder made a mortgage in fee of the land, together with the sawmills and other buildings, fixed machinery and fixtures. The mortgagee, who had entered into possession, was held entitled to prevent the owner of the gas engine from removing it. *Hobson v. Gorringe, supra*.

Under hire and purchase agreement.

A mortgage in fee of a mill, together with all fixtures, passes to the mortgagee as against the assignee in bankruptcy of the mortgagor all machinery fixed to the soil by screws, solder or other permanent means. *Mather v. Fraser*, (1856) 2 K. & J. 536.

A steam engine and other things were attached for the purpose of steadying them to the walls and floor by bolts, but could have been removed without injury to themselves or to the buildings. The owner in fee had mortgaged the property before the goods came on the land. The mortgagee successfully resisted a claim to the gas engine made by a purchaser from the trustees of an

inspectorship deed executed by the mortgagor. *Walmsley v. Milne*, (1859) 29 L. J. C. P. 97.

True owner's right after mortgagee's entry into possession.

The facts in *Gough v. Wood & Co.*, *supra*, differ from those in *Hobson v. Gorringe*, *supra*, in the following respects:—(1) The date of the mortgage was prior to the placing of the fixtures on the land so that the mortgagee was not claiming something which had passed by the mortgage, but an additional security which he had allowed to come on the land. (2) The fixtures were removed by the true owner before the mortgagee intervened by going into possession.

The true owner cannot, after a mortgagee has entered into possession, remove chattels fixed to the soil, though they were brought on the land after the date of the mortgage. *Reynolds v. Ashby & Son*, 73 L. J. K. B. 946; [1904] A. C. 466.

Equitable mortgage.

Where the mortgage is only an equitable one, and is given after the hire-purchase agreement, even if the mortgagee advanced his money without notice of the hire-purchase agreement, it is postponed to the rights of the person who has let the goods. *In re Samuel Allen & Sons, Limited*, 76 L. J. Ch. 362; [1907] 1 Ch. 575.

The above cases negative the suggestion made in the *Cumberland Union Banking Co. v. Maryport Hematite Co.*, [1892] 1 Ch. 415, that a hire-purchase agreement made between a lessee and the true owner of fixed machinery would, so long as the rent reserved on the lease was paid, protect the true owner from a claim by a mortgagee of the lessee to the fixtures.

Chairs hired for a public entertainment, and in accordance with a requirement of the public authority screwed to bars fastened to the floor, were held, not to form part of the property mortgaged, but to remain chattels. *Lyon & Co. v. London City and Midland Bank*, [1903] 2 K. B. 135.

SHIPS.

Mortgages of ships are regulated by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), an Act to consolidate enactments relating to Merchant Shipping.

A ship is not an ordinary chattel, but the property in her is governed by the law of the port to which she belongs. A British ship can only be mortgaged in the statutory form and registered in the way contemplated by the Act. Statutory provisions.

The statutory form of mortgage contained in Form B, schedule 1, purports to mortgage the shares of which the mortgagor is owner "in the ship above particularly described and in her boats, guns, ammunition, small arms, and appurtenances." What passes as "ship."

Under the word "ship" pass to the mortgagee all articles necessary to the navigation of the ship or to the prosecution of the adventure, such as articles necessary for steering, lights necessary for navigation, sails necessary for sailing and articles which practically consist of machinery for working fishing gear, whether on board at the date of the mortgage or brought on board in substitution for them subsequently to the mortgage. *Coltman v. Chamberlain*, (1890) 59 L. J. Q. B. 563; 25 Q. B. D. 328.

Sect. 83:—If there are more mortgages than one registered in respect of the same ship or share, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority one over the other, according to the date at which each mortgage is recorded in the register book, and not according to the date of each mortgage itself.

Sect. 56:—No notice of any trust, express, implied, or constructive, shall be entered in the register book or

be receivable by the registrar, and subject to any rights and powers appearing by the register book to be vested in any other person the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration.

Section 57 :—The expression “beneficial interest,” where used in this part of this Act, includes interests arising under contract and other equitable interests; and the intention of this Act is, that without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners and mortgagees, and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property.

Unregistered interests postponed to subsequent registered.

These sections must be read together. Although equitable interests in ships, such as a contract to sell, are recognized by the courts of law, a legal mortgage of a ship in the statutory form and registered has priority over an equitable mortgage previously given, even where the legal mortgagee takes with notice of the charge. *Hughes v. Sutherland*, (1881) 50 L. J. Q. B. 567; 7 Q. B. D. 160; *Black v. Williams*, 64 L. J. Ch. 137; [1895] 1 Ch. 408; *Barclay & Co., Ltd. v. Poole*, [1907] 2 Ch. 284.

No provision for erasure.

There is no provision in the Act which authorizes the registrar to erase entries of mortgages upon their being discharged, but an entry to that effect may be made under

section 32. *Chasteauneuf v. Capeyron*, (1881) 51 L. J. P. C. 37; 7 App. Cas. 127:

Sect. 34:—Except so far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.

The mortgagee on taking possession is bound by agreements made by the mortgagor with reference to the employment of the ship in cases where the mortgagor's dealings with the ship have not materially impaired the security, and the mortgagee taking possession is entitled to the benefit of such agreements. *Collins v. Lamport*, (1864) 34 L. J. Ch. 196; *The Heather Bell*, 70 L. J. P. 57; [1901] P. 272.

The mortgagees are not bound by a charterparty for the carriage at a high rate of freight of contraband of war to belligerents. *Law Guarantee & Trust Society v. Russian Bank*, 74 L. J. K. B. 577; [1905] 1 K. B. 815.

As a general rule a mortgagee, in exercising his power of sale, will not be bound by a contract of the mortgagor made before the mortgage of which he had no notice. *The Celtic King*, [1894] P. 175.

The mortgagee of a ship does not obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or indeed to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own or for his own benefit. Those goods which are brought home for him he may sell at their full market price when they arrive in

Mort-
gagor's
agree-
ments
binding
on mort-
gagee.

If these
are rea-
sonable.

Right to
freight.

this country, thereby, of course, bringing into his own pocket not merely the original value of the goods, but also the portion of remuneration which represents the value of the carriage of those goods from abroad. Or again, he may attach to the carriage of goods a rate of freight which may be either nominal or may be very far under the ordinary rate of freight of the market. All those acts would be the ordinary incidents of the ownership of the mortgagor, who remains the *dominus* of the ship with regard to everything connected with its employment, until the moment arrives when the mortgagee takes possession. When a mortgagee takes possession he becomes the master or owner of the ship, and his position is simply this: from that time everything which represents the earnings of the ship which had not been paid before must be paid to the person who is then the owner, who is in possession. *Keith v. Burrows*, (1877) 46 L. J. C. P. 801; 2 App. Cas. 636.

A mortgagee of a ship on taking possession is only entitled to receive unpaid freight which has been or will be earned on the voyage during which he takes possession. He is not entitled to all freight then unpaid, whether previously earned or not. If the mortgagee finds any cargo on board in respect of which the freight has accrued, and on which the mortgagor has a lien for the freight, the mortgagee succeeds to that lien, and can enforce it in a court of law. In order that a mortgagee on taking possession can claim freight there must be a contract to pay freight. If therefore a mortgagor ships goods of his own, even on a voyage which commences after the date of the mortgage, the mortgagee on taking possession has no lien. *Keith v. Burrows*, *supra*; *Shillito v. Biggart*, 72 L. J. K. B. 294; [1903] 1 K. B. 683.

The owner of a ship, insured and mortgaged together

with the policies of insurance effected thereon to secure advances, cannot insist that repairs must be paid for out of the money payable by the underwriters in respect of a particular average loss. The mortgagee is entitled to recover from the underwriters the amount for his own use. *Swan & Clelands v. Maritime Insurance Co.*, 76 L. J. K. B. 160 ; [1907] 1 K. B. 116.

The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereon not only what is due on his first mortgage, but also the amount of any subsequent charge which he may acquire on the freight in priority to every equitable charge of which he had no notice ; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. *Liverpool Marine Credit Co. v. Wilson*, (1872) 41 L. J. Ch. 798 ; 7 Ch. 507.

UNCALLED CAPITAL.

By apt and proper words or sufficient context in the memorandum of association or in contemporaneous articles of association a limited company may take power to mortgage uncalled capital, including calls made after the commencement of the winding-up. *Pyle Works*, (1890) 59 L. J. Ch. 489 ; 44 C. D. 534 ; *Newton v. Anglo-Australian Investment, Finance and Land Co.*, 64 L. J. P. C. 57 ; [1895] A. C. 244. Uncalled capital.

There is no power to mortgage reserve capital formed under the Companies Act of 1879 (42 & 43 Vict. c. 76). Section 5 enables a limited company to divide capital into two parts, one of which shall only be called up in the event of a winding-up. When the capital of the company Reserve capital.

has been so divided that part which can only be called up in the event of a winding-up ceases to be subject to the control of the directors and cannot be charged or disposed of by them. *Bartlett v. Mayfair Property Co.*, 67 L. J. Ch. 387; [1898] 2 Ch. 28.

Registration of mortgages and charges.

Every mortgage or charge created by a limited company is void against the liquidator and any creditor of the company unless filed for registration within twenty-one days after the date of its creation. Companies Act 1900 (63 & 64 Vict. c. 48), s. 14.

POLICIES OF ASSURANCE.

Policy of assurance.

A mortgage of a policy of assurance is of very little value unless the mortgagor assigns also some property, the annual income of which is sufficient to pay the premiums or the surrender value of the policy is substantial.

Notice to the company.

An assignee who gives notice of his assignment to the assurance company in the manner provided by the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), can sue the company in his own name.

No action until notice.

No assignment of a policy confers on the assignee any right to sue until a written notice of the date and purport of the assignment has been given to the company at their principal, or one of their principal, places of business, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment. The Policies of Assurance Act, 1867, s. 3.

Rights *inter se*.

The Act was passed in order to avoid the necessity of joining the assignor of the policy in actions against the assurance company. It applies as between the company and the persons interested in the policy, and does not affect the rights of those persons *inter se*.

Procedure when no notice given.

A second mortgagee, with notice of a prior mortgage, does not gain priority over the prior mortgage by giving

the first notice to the company. *Newman v. Newman*, (1885) 54 L. J. Ch. 598; 28 C. D. 674.

An agreement to assign is not within sect. 3 of the above Act. *Spencer v. Clarke*, (1878) 9 C. D. 137.

A mortgagee who possesses no assignment within the meaning of the above Act cannot compel payment from the assurance company in the absence of a personal representative of the mortgagor. *Crossley v. City of Glasgow Life Assurance Society*, (1876) 4 C. D. 421.

Procedure
when no
notice
given.

Under Ord. XVI., r. 46, replacing sect. 44 of the Chancery Procedure Act, the Court has jurisdiction to dispense with a personal representative. This was done where the debt was largely in excess of the policy money, the estate of the intestate insolvent, and the next of kin declined to take out administration. *Curtius v. Caledonian Insurance Co.*, (1881) 19 C. D. 534.

Such an order was refused where the sum payable on the policy was largely in excess of the mortgage debt. *Webster v. British Empire Mutual Life Assurance Co.*, (1880) 49 L. J. Ch. 769; 15 C. D. 169.

As the assurance company are justified in refusing to pay without an order of the Court in such a case, they are entitled to deduct from the fund their taxed costs and pay interest only from the date of the order of payment. *Webster v. British Empire Co.*, *supra*.

Costs of
assurance
company.

Policies of assurance may contain a clause making the policy void in certain cases, except to the extent of any *bonâ fide* interest which at the time of the death should be vested in any other person or persons for valuable consideration. If a policy of this class is mortgaged, the office, after payment of the policy money to the mortgagee, cannot claim repayment or contribution from other property of the mortgagor included in the same mortgage, and if the office is the mortgagee it comes within the

Clause of
forfeiture
except to
extent of
bonâ fide
assign-
ment.

exception to the condition, and therefore the policy is valid to the extent of the mortgage debt due to them at the death of the assured. *Solicitors and General Life Assurance v. Lamb*, (1864) 33 L. J. Ch. 426; *White v. British Empire Mutual Assurance Company*, (1869) 7 Eq. 394.

Policy
taken out
for pur-
pose of
security.

On loans to persons, whose interest in the mortgaged property depends on the duration of their lives, or arises only on the happening of an uncertain event, it is usual to supplement the security with an insurance policy.

When the policy is created for the purpose of the security, or is in the name of the mortgagee, or effected by him, or the premiums are paid by him, the ownership of the policy is a question of fact.

Owner-
ship.

If the debtor either pays or agrees to pay the premiums, the policy is (*primâ facie*, at all events) the property of the debtor, subject to the creditor's security, and the debtor or his representative is entitled to the policy, if the debt is paid. *Drysdale v. Piggot*, (1856) 25 L. J. Ch. 878; 8 D. M. & G. 546; *Morland v. Isaac*, (1855) 24 L. J. Ch. 753; 20 B. 389; *Courtenay v. Wright*, (1860) 30 L. J. Ch. 131; 2 Giff. 337.

The policy is the absolute property of the creditor if he took it out without communication with the debtor and under such circumstances that he could not have sued him to recover the amount paid for premiums. *Bruce v. Garden*, (1869) 39 L. J. Ch. 334; 5 Ch. 32.

It has been suggested that in the absence of any allegation of fraud, oppression, or other unfair dealing there might be a contract that the policy should be effected for the creditor's protection only, and for his sole benefit, subject to an option for the debtor to make it his own, in the event of his paying off the debt, and that in such a case an obligation on the debtor to pay the premiums would not make the policy the property of the debtor,

contrary to the contract. *Salt v. Marquis of Northampton*, 61 L. J. Ch. 49; [1892] A. C. 1.

LEASEHOLDS.

Leaseholds are usually mortgaged by way of sub-demise of the term vested in the mortgagor, less the last few days, and the deed frequently contains a declaration by the mortgagor that he will stand possessed of the last days of the term in trust for the mortgagee. A power of attorney to sell the outstanding days is sometimes in addition given to the mortgagee.

Leaseholds.

In this way a mortgagee escapes the liabilities of an assignee of the lease, but is in a position to become himself, or make a purchaser, an assignee, when desirable.

Mortgaged leaseholds renewable by custom, but not under a covenant to renew, became incapable of renewal. The assignee of the equity of redemption, who was under no personal obligation to pay the mortgage money or obtain a renewal before the expiration of the lease negotiated for, and after the expiration, obtained from the lessors a conveyance of the fee. It was held that the fee was an accretion to the mortgaged leasehold, and that the mortgagees were entitled to it. *Leigh v. Burnett*, (1885) 54 L. J. Ch. 757; 29 C. D. 231.

Renewable leaseholds.

Where the mortgagee of a renewable term procured from the original landlord a new term to commence from the expiration of the old one, it was held that the new term was subject to the old equity of redemption. *Rakestraw v. Brewer*, (1728) 2 P. Wms. 511.

Renewal of lease.

The renewal is looked upon as an accretion to or graft upon the original term arising out of the goodwill or quasi-tenant right annexed thereto, and therefore subject to the same liabilities. This equitable doctrine is not limited in its application to cases where the old lease was

renewable by agreement or custom or where the new lease was obtained by surrender on or before the expiration of the old lease. As between mortgagor and mortgagee, each of these owes a duty to the other in respect of the mortgaged property; and in case of one being able, by virtue of his position, to obtain a renewal of a mortgaged lease, there are obvious grounds why it should be held against him, at any rate as a rule, that the renewed lease should be treated as engrafted on the old and as forming part of the mortgage security. In the case of a mortgagee renewing, it was put as follows by the Court in the case of *Rakestraw v. Brewer*: "This additional term comes from the old root and is of the same nature, subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagees getting such additional terms more easily, as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor." *Biss v. Biss*, [1908] 2 Ch. 40 at p. 62.

Bank-
ruptcy of
lessee.

By the Bankruptcy Act, 1883, s. 55, the trustee in bankruptcy of a lessee is authorized to disclaim any property burdened with onerous covenants, at any time within three months after his appointment, or if such property shall not have come to his knowledge within one month after his appointment, within two months after he first became aware thereof.

Dis-
claimer of
mortgaged
lease.

When the trustee has disclaimed a lease which the bankrupt has mortgaged by sub-demise, the original lessor is, under the Bankruptcy Act, 1883, s. 55, entitled to apply to the Court for an order vesting the property in the mortgagee, subject to the same liabilities and obligations as the bankrupt was subject to under the original lease in respect of the property at the date when the bankruptcy petition was filed, and, if the mortgagee

declines to accept such an order, he will be excluded from all interest in and security upon the property. *In re Finley, Ex parte Clothworkers' Co.*, (1888) 57 L. J. Q. B. 626; 21 Q. B. D. 475; following *In re Cock, Ex parte Shilson*, (1887) 57 L. J. Q. B. 169; 20 Q. B. D. 343; and see *In re Smith, Ex parte Hepburn*, (1890) 59 L. J. Q. B. 554; 25 Q. B. D. 536; *Lea v. Thursby*, 73 L. J. Ch. 518; [1904] 2 Ch. 57.

It was questioned in the above case of *In re Finley* whether, if such a vesting order is made, the mortgagee will be liable under the original lease to the same extent as if he had been the original lessee, or only as if he were an assignee of the original lease, in which latter case he could get rid of his liability by assignment.

The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13:—
The period of twelve months shall be substituted for each of the periods of three months and two months limited by sub-section one of section fifty-five of the principal Act, and such period of twelve months may be extended by the Court.

The Court may, if it thinks fit, modify the terms prescribed by the proviso in sub-section six of the same section, so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order.

A sub-assignee of a lease sub-demised it by way of mortgage and became bankrupt, and his trustee disclaimed the lease. The original lessee and the assignee from him were solvent and able to perform the covenants in the lease; the lessor was held entitled, without serving anyone but the mortgagee, to apply for an order putting

Liability
of mort-
gagee
after dis-
claimer by
trustee.

the mortgagee to his election, whether he would accept an order vesting the lease in him, subject to the liabilities to which, at the date of the filing of the bankruptcy petition, the bankrupt was subject under the lease, or be excluded from all interest in and security upon the property. *In re Baker, Ex parte Lupton*, 70 L. J. K. B. 856; [1901] 2 K. B. 628.

Discretion
under
s. 13 of
the Act of
1890

Where the bankrupt mortgagor was the original lessee and there was in the lease no reservation on the lessee's right to assign and no power of re-entry in case of the lessee's bankruptcy, the Court exercised its discretion under s. 13 of the Bankruptcy Act, 1890, by making an order vesting the disclaimed property in the mortgagees, "subject only to the same liabilities and obligations as if the leases had been assigned to them at the date when the bankruptcy petition was filed." *In re Carter and Ellis, Ex parte Savill Bros.*, 74 L. J. K. B. 442; [1905] 1 K. B. 795.

COPYHOLDS.

Copy-
holds.

A mortgage deed of copyholds deals with the property intended to be mortgaged, by means of a covenant from the mortgagor to surrender to the lord of the manor the property to the use of the mortgagee subject to a condition that the surrender shall be void on payment of the principal and interest.

Vesting
order.

It has been considered that if the mortgagor refuses to surrender, a vesting order can be made in favour of the mortgagee, and that therefore an express declaration of trust of the copyholds is unnecessary. (15 & 16 Vict. c. 55.) *Re Crowe's Mortgage*, (1871) 51 L. J. Ch. 32; 18 Eq. 26; *Re Cuming*, (1869) 5 Ch. 72; Davidson's Concise Precedents, 13th ed., 192.

The power of making a vesting order would seem to

depend on the question whether the parties have put themselves in such a position that, under the circumstances, the mortgagee can enforce specific performance of the covenant to surrender. *In re Carpenter*, (1854) Kay, 418; *In re Colling*, (1886) 55 L. J. Ch. 486; 32 C. D. 333.

An actual surrender to the lord by the mortgagor, involving an entry of that fact on the Court Rolls, is necessary to prevent a second mortgagee from obtaining a surrender to himself, in which case he may acquire the legal estate without notice of any prior equity. *Whitbread v. Jordan*, (1835) 1 Y. & C. 304.

Notice of mortgage on the Court Rolls.

Before admittance, a mortgagee of copyholds may bring an action of foreclosure. *Sutton v. Stone*, (1740) 2 Atk. 101.

Before admittance.

If the mortgage has been made by deed, a mortgagee of copyholds can sell under the provisions of the Conveyancing Act, 1881, s. 21.

Except that the legal right to admittance does not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom in that behalf.

“On foreclosure of an equitable mortgage of copyholds, the mortgagor, being the person to take the necessary steps for an effectual surrender, must pay the expense of all such steps.” Per Kindersley, V.-C., *Pryce v. Bury*, (1853) 2 Dr. 41.

The thirtieth section of the Conveyancing Act, 1881, does not apply to land of copyhold or customary tenure, vested in the tenant on the Court Rolls of any manor by way of mortgage. (Copyhold Act, 1887, s. 45.) See p. 125.

Devolution on death of mortgagee.

Where the mortgagee (as mostly happens) is not admitted and dies, the land is not at his death vested in

him as tenant on the Court Rolls, and the right to admittance seems still to vest in his personal representatives under sect. 80 of the Conveyancing Act. Wolstenholme & Brinton, 6th ed., 80.

Transfer. A transfer of a mortgage of copyholds can be made in three ways. Davidson's Prec. Conv. vol. II., part 11, 4th ed., 798.

- (1) By the mortgagee assigning the mortgage debt, and the mortgagor covenanting for payment of principal and interest, and surrender of the copyholds as in an original mortgage. This method requires the concurrence of the mortgagor, and by vacating the original surrender involves the risk of letting in subsequent incumbrances.
- (2) The mortgagee obtains admittance, if he is not already actually admitted, and surrenders to the use of the transferee. This method involves the payment of fines and fees, both on the admittance of the mortgagee, and the re-admittance of the mortgagor on redemption.
- (3) The transferee is satisfied with the mortgagee's covenant to surrender, of which the transferee can take advantage to perfect his title, if required, while the legal priority of the mortgage is kept up by the original conditional surrender.

Docu-
ments of
title.

The copy of the admission on the Court Rolls is a document of title. A deposit of it makes an equitable mortgage of the property. *Winter v. Anson*, (1824) 3 Russ. 493; *Tylee v. Webb*, (1843) 6 B. 552; *Pryce v. Bury*, *supra*.

An equitable mortgage was constituted by a deposit with his banker of a copy of the admission by a remainderman in reversion after a tenant for life who had been admitted. *Ex parte Warner*, (1812) 19 Ves. 202.

Non-inquiry for the copy of the admission fixes with notice of an equitable mortgage a subsequent legal mortgagee who searched the Court Rolls for incumbrances. *Whitbread v. Jordan, supra.*

This case has been criticised as an extreme one (n. 4 Y. & C. 568). It probably turned on the facts of the case, that, in the particular manor, it was the custom to give only one copy, and that the legal mortgagee made no inquiry in order that he might not know the certainty of what he suspected, namely, that it was deposited for value.

On an enfranchisement after the passing of this Act, the lord of the manor shall continue to be entitled in case of escheat for want of heirs to the same right and interest in the land as he would have had if it had not been enfranchised. The Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 3. For escheat, see p. 126.

Enfranchisement
and
escheat.

A mortgagee, who has been admitted, can enfranchise. The Copyhold Act, 1887, s. 47 (a).

CHAPTER III.

EQUITABLE MORTGAGE.

Kinds. AN equitable mortgage is a mortgage which, for want of a transfer of the legal estate, has only an equitable operation.

Equitable mortgages are of three kinds :—

- I. A mortgage of property, the legal interest in which is outstanding, either in a prior incumbrancer, when it is a mortgage of an equity of redemption, or in a trustee for the mortgagor. These mortgages may be either of realty or personalty.
- II. A mortgage by deposit of title deeds with or without a memorandum of deposit.
- III. Written agreements to execute legal mortgages or equitable mortgages of the first two kinds.

Agreement to execute legal mortgage.

By a deposit of title deeds a mortgagor contracts that his interest shall be liable to the debt, and that he will make such assurance or conveyance as may be necessary to vest his interest in the mortgagee. He does not contract that he will make a perfect title, but he does bind himself to do all that is necessary to have the effect of vesting in the mortgagee such interest as he, the mortgagor, has. In the case of an equitable mortgage of freeholds by a legal owner the contract is that he should execute a legal mortgage, unless the circumstances show that the intention was that the mortgagee was to be content with an equitable mortgage. This might be so where the deposit was not to secure the repayment of a

present loan, but to indemnify against a liability which might never arise. *Pryce v. Bury*, (1853) 2 Drew. 41; *Sporle v. Whayman*, (1855) 24 L. J. Ch. 789; *Carter v. Wake*, (1877) 46 L. J. Ch. 841; 4 C. D. 605; *National Provincial Bank of England v. Games*, (1886) 55 L. J. Ch. 576; 31 C. D. 582; *Sadler v. Worle*, 63 L. J. Ch. 551; [1894] 2 Ch. 170.

The legal mortgage when executed should contain all clauses which the mortgage may reasonably require to give effect to the previous charge. It should not extend the security, as by including in a mortgage of an hotel, the goodwill, when the memorandum accompanying the deposit had not expressly, or by implication, included the goodwill, or by excluding sect. 17 of the Conveyancing and Law of Property Act, 1881, which abolishes consolidation of mortgages, unless a contrary intention is expressed in the mortgage deeds or one of them. *Whitley v. Challis*, 61 L. J. Ch. 307; [1892] 1 Ch. 64; *Farmer v. Pitt*, 71 L. J. Ch. 500; [1902] 1 Ch. 954.

What legal mortgage should contain.

I. MORTGAGES OF EQUITABLE INTERESTS.

When the mortgage is of an equity of redemption, the mortgagee has, as between himself and all behind him, a prior right to require a reconveyance from a prior mortgagee. *Teevan v. Smith*, (1882) 51 L. J. Ch. 621; 20 C. D. 724.

Equitable interests.

The contract of a subsequent mortgagee with the mortgagor is, that he is to have a security on the property subject only to the charge of the prior mortgagee, so long as the prior mortgagee remains unpaid. *Adams v. Angel*, (1877) 5 C. D. 634.

Right of puisne mortgagee.

As between the mortgagor and the mortgagee, the mortgage is a mortgage of the mortgagor's entire interest, saving only the rights of prior incumbrancers. After

executing the mortgage the mortgagor has no interest legal or equitable in priority to the mortgagee. A mortgagor falsely represented to an intending mortgagee that he had deposited a deed for value with a named person, afterward she did deposit the deed for value with that person, who, however, it was held, had gained thereby no priority, but only an interest in the equity of redemption. *Frazer v. Jones*, (1846) 5 H. 475.

A subsequent incumbrancer, on paying off a prior mortgagee, is entitled to all the securities for the debts in respect of which he could have been foreclosed. If two estates, one a good one and one an insufficient security, are mortgaged to A., then the insufficient one to B., and then both to C., B. can redeem both and hold them against C. for his own debt and for what he has paid A. *Mutual Life Insurance Society v. Langley*, (1886) 53 L. J. Ch. 996; 32 C. D. 460.

Notice, in case of mortgage of realty.

A mortgagee of an equitable interest in realty should, in prudence, give notice of his charge to the holder of the legal interest, otherwise he is liable to have the property dealt with in a manner destructive of his rights.

Rights acquired by giving notice.

The advantages of giving notice are :—He becomes entitled to notice of an intention to sell from a first mortgagee who has contracted to give notice to the mortgagor or his assigns. *Hoole v. Smith*, (1881) 50 L. J. Ch. 576; 17 C. D. 434. Without his consent there can be no waiver effectual as against him by the mortgagor of any irregularity committed by the first mortgagee in the exercise of his powers. *Selwyn v. Garfit*, (1888) 57 L. J. Ch. 609; 38 C. D. 273. He is entitled to damages from a first mortgagee, who, on selling, hands over the surplus to the mortgagor, without providing for the second mortgagee's charge, or who joins with the mortgagor in reconveying the property, freed and discharged from the mort-

gage debt, to a purchaser for value without notice, so that the second mortgagee's right of redemption is lost. Such a notice will prevent a first mortgagee from reconveying the legal estate to the mortgagor. *West London Commercial Bank v. Reliance Permanent Society*, (1885) 54 L. J. Ch. 1081; 29 C. D. 954; *London County Banking Co. v. Goddard*, 66 L. J. Ch. 261; [1897] 1 Ch. 642.

Notice to the trustee is an essential part of an assignment of an equitable interest in personalty, except as against the assignor. *Dearle v. Hall*, (1823) 3 Russ. 1; *Loveridge v. Cooper*, 3 Russ. 31; *Foster v. Cockerell*, (1835) 3 Cl. & F. 456.

Mortgages of personalty rank in order of notice.

The reason of this necessity for notice has been differently stated. In some authorities, the giving of notice in respect of a chose in action has been likened to delivery of a chose in possession; in some cases the Court has relied on the necessity of preventing frauds by *cestuis que trust* in creating successive incumbrances without disclosing the earlier ones; in some, on the notion that no person shall claim advantage from the assignment of a chose in action who has not done everything requisite to complete the title; in some, on the view that the notice converts the trustee for the assignor into a trustee for the assignee. *White v. Ellis*, 61 L. J. Ch. 178; [1892] 1 Ch. 188; *Re Lake, Ex parte Cavendish*, 72 L. J. K. B. 117; [1903] 1 K. B. 151.

The doctrine, with regard to the effect of notice by an equitable incumbrancer to the person having the legal interest, laid down in *Dearle v. Hall*, *Loveridge v. Cooper*, and *Foster v. Cockerell*, does not apply to interests in real estate, and the priority in title must be determined by the priority of the several conveyances in point of time. *Jones v. Jones*, (1838) 8 S. 633; *Beckett v. Cordley*, (1784) 1 Bro. C. C. 353; *Wilmot v. Pyke*, (1845) 5 H. 14; *Union*

Mortgages of realty in order of notice.

Bank v. Kent, (1888) 57 L. J. Ch. 1022; 39 C. D. 238; *Carritt v. Real and Personal Advance Co.*, (1889) 58 L. J. Ch. 688; 42 C. D. 263; *Humber v. Richards*, (1890) 59 L. J. Ch. 728; 45 C. D. 589; *Hopkins v. Hemsworth*, 67 L. J. Ch. 526; [1898] 2 Ch. 347.

Personalty for this purpose means not only chattels in possession, but also bonds, simple contract debts and other choses in action, except mortgage debts, also interests in the money to arise by sale or mortgage of lands. A mortgagee of book debts must give notice of his mortgage with all reasonable dispatch to the debtors, otherwise his mortgage will be void as against a subsequent mortgagee, without notice of the first who gives such notice before the prior mortgagee, and if the mortgagor becomes bankrupt, the effect of giving no notice is to leave the debts in the order and disposition of the bankrupt with the consent of the true owner. *Wigram v. Buckley*, 63 L. J. Ch. 689; [1894] 3 Ch. 483; *Rutter v. Everett*, 64 L. J. Ch. 845; [1895] 2 Ch. 872.

The reason is, a conveyance of realty gives an estate and not an equitable right against the trustee. Consequently the effect of different mortgages over a property may be said to be the same as if different successive estates were granted by the same conveyance. *Jones v. Jones*, *supra*.

Chattels
real.

Mortgages of chattels real follow the same rule as realty. *Wiltshire v. Rabbits*, (1844) 14 S. 76; *Phipps v. Lovegrove*, (1873) 16 Eq. 80.

It is unnecessary to give notice of an assignment of a mortgage debt, though a chose in action, where the subject of the security is land. *Jones v. Gibbons*, (1804) 9 Ves. 407; *Taylor v. London & County Banking Company*, 70 L. J. Ch. 477; [1901] 2 Ch. 231.

Land
upon trust
for sale.

Equitable interests in land, subject to an overriding

trust for sale, so that the beneficiaries can take the property as money, follow the rule in *Dearle v. Hall*; *secus*, where the land is subject only to a power of sale. *Wilmot v. Pike*, *supra*; *Arden v. Arden*, (1885) 54 L. J. Ch. 655; 29 C. D. 702; *Lloyd's Bank v. Pearson*, 70 L. J. Ch. 422; [1901] 1 Ch. 865.

Where a testator devised, subject to a life estate, a specific property upon trust to sell, and his residuary realty to be divided, the date of notice to the trustees gave priority in the case of the specific estate, the date of conveyance in the case of the residuary realty, though the beneficiaries had in deeds among themselves treated the residuary estate as personalty. *Lee v. Howlett*, (1856) 2 K. & J. 531. Notice is not essential when land is converted under a power exercised subsequently to the advance. *Bugden v. Bignold*, (1843) 2 Y. & C. C. 377.

As against an equitable assignee who has given notice to the legal holder of the personal fund assigned, it is no defence to a prior assignee who has not given notice, that his assignment rendered it impossible for him to give notice, or by express contract prevented him. *English and Scottish Mercantile Investment Trust, Limited v. Brunton*, 62 L. J. Q. B. 136; [1892] 2 Q. B. 1, 700.

Omission
of notice.

The trustees to whom notice must be given are the persons who have the control and custody of the fund or in the language of Lord Macnaughten in *Ward v. Duncombe*, *supra*, those who have "legal dominion over the fund." But where there are two settlements, one original and the other derivative, notice should be given to the immediate trustees of the *cestui que trust*. *Stephens v. Green*, 64 L. J. Ch. 546; [1895] 2 Ch. 148.

Who are
trustees.

Notice to one of several trustees is sufficient. *Smith v. Smith*, (1833) 2 C. & M. 231. An incumbrancer of a trust fund who first gives notice to a trustee obtains

Notice to
one trustee.

priority over any prior incumbrancer who has given no notice. *Low v. Bouverie*, 60 L. J. Ch. 594; [1891] 3 Ch. 82, even though the trustee receiving the notice has an interest in suppressing it, as where the husband of a legatee beneficially entitled under a will to a share in a testator's residuary estate had joined with his wife in mortgaging her share and the mortgagee had given notice to no other of the trustees except the husband of the mortgagor. *Willes v. Greenhill*, (1860) 4 D. F. & J. 147.

After retirement of trustee who received notice.

Notice to one of several trustees is good only so long as he continues a trustee, and does not protect against subsequent incumbrances created after every trustee who knew of the prior incumbrance has died (*Meux v. Bell*, (1841) 1 H. 73) or has ceased to be trustee, because then there would be no trustee from whom the subsequent incumbrancer could learn of the prior incumbrance before making his advance. *Timson v. Ramsbottam*, (1836) 2 Keen, 85; *In re Hall*, (1880) 7 L. R. Ir. 180. When new trustees had no knowledge of the notice given to previous trustees by a prior incumbrancer, a second incumbrancer, making his advance during the trusteeship of the new trustees, and giving them first notice, was held to have priority over the prior incumbrancers. *Phipps v. Lovegrove*, *supra*.

The previous cases have been considered in the House of Lords, and though they were not expressly dissented from, doubt was thrown upon the proposition, founded on *Timson v. Ramsbottam*, *supra*, that an incumbrancer, who has given notice, can on a change of trustees be deprived of his pre-existing title by a subsequent incumbrancer anticipating him in giving notice to the new trustees. *White v. Ellis*, *sub nom. Ward v. Duncombe*, 62 L. J. Ch. 881; [1893] A. C. 369.

Notice to all trustees

The result of the cases may, therefore, be said to be

(1) a notice given to one of several trustees is effective against incumbrances made while he remains a trustee; remains effective.
 (2) a notice given to all the existing trustees is not rendered ineffective by a change of trustees. *In re Wasdale, Britten v. Partridge*, 68 L. J. Ch. 117; [1899] 1 Ch. 163; *Freeman v. Laing*, 68 L. J. Ch. 586; [1899] 2 Ch. 355; *In re Phillips' Trusts*, 72 L. J. Ch. 94; [1903] 1 Ch. 183.

A. and B., without notice of each other's advances, made advances on trust funds at a time when, by death of the trustee without leaving personal representatives, there was no person to whom notice could be given. B., by serving the bank with distringas, obtained priority over A., who did nothing. *Etty v. Bridges*, (1849) 2 Y. & C. C. 486. When there are no trustees.

Notice of a mortgage of a residuary share in personality and of a legacy given to trustees upon trust, should be given to the executor before assent by him. *Holt v. Dewell*, (1845) 4 H. 446. Charge on residuary share.

Notice must be given to a person who is at the date of the notice a legal holder of the fund; therefore a notice given to a person who afterwards becomes trustee is unavailing against an incumbrancer who advanced his money before and is the first to give him notice after he becomes trustee. *Johnstone v. Cox*, (1880) 50 L. J. Ch. 216; 19 C. D. 17; *Addison v. Cox*, (1872) 8 Ch. 76; *In re Dallas*, 73 L. J. Ch. 365; [1904] 2 Ch. 385. To person before he becomes trustee.

Express notice is unnecessary if the trustee in fact has notice before the date of the subsequent mortgage. Accidental notice.

Notice derived by a trustee from casual conversation, or from perusal of a newspaper report, protects the first incumbrancer, assuming that the notice was sufficiently clear to affect the mind of an ordinary man of business. In casual conversation.
Lloyds v. Banks, (1868) 37 L. J. Ch. 881; 3 Ch. 488.

Accidental notice to a trustee of a prior incumbrance The order

of priorities not determined by accidental notice.

prevents a subsequent incumbrancer from gaining priority, because if he had made inquiries from the trustee before advancing his money he might have learnt the existence of the first; but incumbrances do not rank according to the order of accidental knowledge obtained by the trustees, as they would do in the case of express notice. *Arden v. Arden, supra.*

To solicitor.

Notice to a solicitor employed by the trustees is not notice to the trustees unless, in fact, they obtain information or have represented him as their agent to receive notices. *Saffron Walden v. Rayner*, (1880) 49 L. J. Ch. 465; 14 C. D. 406.

The notice which an assignor trustee has of his own incumbrance is not sufficient to give the assignee priority against a subsequent incumbrancer who gives due notice to all the trustees, because such notice does not affect the object for which notice to trustees is required, viz., the security of the party taking the assignment against prior assignments concealed from him by his assignor. *Browne v. Savage*, (1859) 4 Dr. 635; *Lloyds' Bank v. Pearson*, 70 L. J. Ch. 422; [1901] 1 Ch. 865.

A circle of notices may sometimes be given. If there are two trustees, A. and B., the first incumbrancer gives notice of his charge to A. only; the second gives notice of his charge to A. and B., then A. dies, and a third incumbrance is created, of which notice is given to B. Thus, the third incumbrancer will stand after the second, because B. had notice of the second incumbrance; but he will also stand before the first, for B. was unaffected by any notice of that incumbrance. The third incumbrancer is subrogated to the rights of the first, and the fund is divided as follows:—first, to the third incumbrancer to the extent of the claim of the first; secondly, to the second incumbrancer; thirdly, to the third incum-

brancer to the extent to which he might remain unpaid after the money he had received whilst standing in the shoes of the first incumbrancer. *Benham v. Keane*, (1862) 31 L. J. Ch. 129; *White v. Ellis*, *supra*.

In a contest between the incumbrancer and the trustees to fix the trustees with notice of an incumbrance and not to settle the priorities of incumbrances, new trustees are not fixed with notice, though retiring trustees of an incumbrance affecting the trust estate, of which no notice appears among the trust deeds and which is not known to them. *Hallows v. Lloyd*, (1888) 58 L. J. 105; 39 C. D. 686.

Notice to old trustees does not fix with liability new trustees who have no knowledge.

When funds are in Court, a stop order (R. S. C. Ord. XLVI.) takes the place of notice to a trustee. *Pinnock v. Bailey*, (1883) 52 L. J. Ch. 880; 23 C. D. 497; *In re Holmes*, (1885) 55 L. J. Ch. 33; 29 C. D. 786.

Funds in Court.

The priority of incumbrances on funds partly in Court and partly in the hands of trustees is regulated by the date of the stop orders for the part in Court, and by the notices to the trustees for the residue. *Mutual Life Assurance Soc. v. Langley*, (1886) 53 L. J. Ch. 996; 32 C. D. 460; *Mack v. Postle*, 63 L. J. Ch. 593; [1894] 2 Ch. 449; *Stephens v. Green*, 64 L. J. Ch. 546; [1895] 2 Ch. 148.

A mortgagee obtaining a stop order after, but without notice of the bankruptcy of the mortgagor, has priority over the trustee in bankruptcy who has not obtained one. *Stuart v. Cockerell*, (1869) 39 L. J. Ch. 127; 8 Eq. 607; *Palmer v. Locke*, (1881) 18 C. D. 381.

If before payment into Court of the proceeds of incumbered property the mortgagees give proper notice of their security to the trustees, they will not be postponed by a subsequent incumbrancer obtaining the first stop order after the subsequent transfer of the funds into Court. *Livesey v. Harding*, (1856) 23 B. 141.

Funds
carried to
separate
account.

Money carried to a separate account is freed from the general questions of the action, so that a stop order on the separate account takes priority over an existing but unascertained liability in the action, and over a prior stop order on the general account if the fund has been carried over to the account of a particular person, but not where it has been carried over to the account of a person and his incumbrancers. *Lister v. Tidd*, (1867) 4 Eq. 462; *Bartlett v. Charles*, (1890) 59 L. J. Ch. 733; 45 C. D. 458.

A subsequent stop order does not gain priority by being lodged at the pay office before a prior stop order. *Re Galland*, W. N. (1886) 96.

Duty of
trustee as
to giving
informa-
tion.

A trustee is not obliged to inform a *cestui que trust* or intending mortgagee what incumbrances exist on the trust fund. He is not liable in damages for incorrect information carelessly but honestly given, unless it is so specific as to amount to an estoppel. "There are no incumbrances," is actionable. "So far as I know, there are no incumbrances," is not actionable, if said in honest forgetfulness. *Low v. Bouverie*, 60 L. J. Ch. 594; [1891] 3 Ch. 82.

A *cestui que trust* is entitled to know how the trust fund is invested, and if entitled to a share of consols standing in the name of a trustee, to obtain from such trustee an authority to the Bank of England enabling him to ascertain whether there are any charging orders, stop orders, or distringases upon the trust fund. *Lee v. Wilson*, 61 L. J. Ch. 38; [1892] 1 Ch. 86.

II. MORTGAGES BY DEPOSIT.

Mortgage
by deposit.

An equitable mortgage by deposit may be with or without memorandum or written agreement to give a mortgage.

A deposit of a document of title without writing or word of mouth will create in equity a charge upon the property referred to. *Shaw v. Foster*, (1872) 5 H. L. 821.

A memorandum accompanying a deposit of title deeds may contain an express declaration of trust by the mortgagor, and a power to the mortgagee to appoint new trustees in the place of the mortgagor; a mortgagor making such a declaration is a trustee for performing the trust within the meaning of s. 125, sub-s. 1, Trustee Act, 1898. *London and County Banking Company v. Goddard*, 66 L. J. Ch. 261; [1897] 1 Ch. 642.

The conditions imposed upon the lender by a memorandum of deposit must be strictly performed, or else the charge will not take effect. *Sporle v. Whayman*, (1855) 24 L. J. Ch. 789; *Burton v. Gray*, (1873) 8 Ch. 932.

Condi-
tions in
memo-
randum.

There are two essentials: (1) Deposit of title deeds. (2) An intention to create a mortgage. *Lacon v. Allen*, (1856) 3 Dr. 579.

Essentials.

A memorandum stating the circumstances under which the deposit was made cannot be contradicted by parol evidence; but if the deposit is stated to be for the purpose of securing a loan of one sum, the loan may be extended to other sums by subsequent verbal agreement. *Ex parte Coombe*, (1810) 17 Ves. 369; *Baynard v. Woolley*, (1855) 20 B. 583; *Ex parte Kensington*, (1813) 2 V. & B. 79; *Ex parte Nettleship*, (1841) 10 L. J. Bk. 67; *James v. Rice*, (1854) 23 L. J. Ch. 819; 5 D. G. M. & G. 461.

Memo-
randum
extended
by parol
evidence.

An equitable mortgage by deposit of title deeds may be extended, even by parol, to cover advances made after a change in the firm with which the deeds are lodged. *Ex parte Lloyd*, (1824) 1 Gl. & J. 389; *Ex parte Lane*, (1846) De G. 800; *Ex parte Nettleship, supra*; Lindley, 5th ed. p. 119.

Delivery
of deeds.

In the case of a mortgage by deposit without memorandum, delivery of the deeds to the creditor, or to some person other than the borrower, as agent for the creditor, is essential. *Adams v. Claxton*, (1801) 6 Ves. 226; *Ex parte Whitbread*, (1812) 19 Ves. 209. The borrower's solicitor may be such an agent for the lender, but not the borrower's wife, if the intention to make her such an agent is shown only by parol. *Ex parte Coming*, (1803) 9 Ves. 115; *Lloyd v. Attwood*, (1859) 29 L. J. Ch. 97.

Oral
contract.

An oral contract to give an equitable mortgage by deposit of deeds is within the Statute of Frauds. To make such a contract enforceable there must be part performance. If the deeds are in the hands of a third person, an oral direction to him by the debtor to hold them for the creditor, orally assented to by the third person, is not sufficient. *Ex parte Broderick, In re Beetham*, (1886) 56 L. J. Q. B. 635; 18 Q. B. D. 380, 766.

Historical
explanation.

In the above case of *Ex parte Broderick*, the law of equitable mortgage by deposit of title deeds is stated to form a branch of the equitable doctrine of the specific performance of oral contracts relating to land based on part performance.

The doctrine of equitable mortgage by deposit of title deeds without memorandum has been criticised adversely by Lord Eldon. *Ex parte Coming, Ex parte Whitbread, supra; Ex parte Wright*, (1812) 19 Ves. 258.

Possession
of title
deeds

Mere possession of the title deeds is not proof of an intention to deposit them as a security for a debt, unless the circumstances are such as to render any other explanation unreasonable. *Featherstone v. Fenwick*, (1784) 1 Bro. C. C. 270, n.; *Harford v. Carpenter*, 1 Bro. C. C. 270, n.; *Ex parte Langston*, (1810) 17 Ves. 227; *Dixon v. Muckleston*, (1872) 8 Ch. 155; *Chapman v Chapman*,

(1851) 20 L. J. Ch. 465 ; 13 B. 308 ; *Smith v. Constant*, (1851) 4 De G. & Sm. 213 ; *Burgess v. Moxon*, (1856) 2 Jur. N. S. 1059.

When there is an agreement to give a legal mortgage, and the title deeds are handed over to the solicitor of the mortgagee, it is a question of fact whether the deeds were handed over as an immediate security or only to enable the solicitor to prepare the mortgage deed ; in many cases this question is decided by considering whether the transaction refers to an existing debt or to a future loan which will only be made on security. *Norris v. Wilkinson*, (1806) 12 Ves. 192 ; *Ex parte Bruce*, (1813) 1 Rose, 374 ; *Hockley v. Bantock*, (1826) 1 Russ. 141 ; *Keys v. Williams*, (1838) 3 Y. & C. Exch. 55 ; *Fenwick v. Potts*, (1856) 8 D. G. M. & G. 506 ; *Lloyd v. Attwood*, *supra*.

It is not necessary, to create an equitable mortgage, that all the title deeds, or even all the material title deeds, should be deposited. It is sufficient if the deeds deposited are material evidences of title. *Roberts v. Croft*, (1857) 24 B. 223 ; 2 De G. & J. 1 ; *Lacon v. Allen*, (1856) 26 L. J. Ch. 18.

Primâ facie the extent of the security intended to be given must be ascertained from an examination of the deeds and the memorandum (if any) accompanying them. *Daw v. Terrell*, (1863) 33 B. 218 ; *Ex parte Kensington*, (1813) 2 V. & B. 83.

When a debtor deposited with his bankers to secure an advance and the balance of his current account a conveyance to himself of minerals under lands at N. and A., with a letter mentioning only the minerals under A., the bankers were held to have no lien on the minerals under N. *Wylde v. Radford*, (1863) 9 Jur. N. S. 1169.

If there has been a definite statement, either in writing or verbally, by the borrower to the lender, and honestly

By mortgagee's solicitor.

Extent of security.

No duty on borrower to

examine
deeds.

believed by the lender, that he has the necessary deeds, he is not bound to examine the deeds, and is not bound by constructive notice of their actual contents or of any deficiencies which he might by examination have discovered in them. *Dixon v. Muckleston, supra.*

In the above case the deposited deeds related to the property contracted to be mortgaged, but were insufficient; a deed of 1774 was deposited with the prior incumbrancer; deeds of 1787, 1818, 1822, and 1848 with the subsequent. The case does not decide the effect of a deposit of obsolete deeds.

Where deeds are deposited with a memorandum not specifying all the deposited deeds, the whole have been held included in the security. *Ferris v. Mullens*, (1854) 2 Sm. & G. 378.

What are
title deeds
for this
purpose.

Title deeds are not the only documents a deposit of which may create an equitable charge upon the land. A charge has been created by deposit of copy of court rolls (*Ex parte Warner*, (1812) 19 Ves. 202); an agreement for purchase, as cited in argument by Sir S. Romilly in *Ex parte Warner*; a receipt for purchase money attached to a plan (*Goodwin v. Waghorn*, (1835) 4 L. J. Ch. 172) It has been doubted if an attested copy of a lease is sufficient, unless there is some good reason why the lease itself should not be deposited. *Ex parte Broadbent*, (1834) 1 Mont. & Ayr. 635.

III. AGREEMENTS IN WRITING.

Agree-
ments in
writing.

The following are instances of documents which have been held to amount to agreements to execute mortgages, and therefore to have in equity the effect of mortgages:—

(i.) An agreement in writing, if sufficiently specific, signed by the owner of land, to transfer an estate by way of security. *Eyre v. McDowell*, (1861) 9 H. L. C. 619.

(ii.) An agreement in writing to deposit a lease when granted, if it is subsequently granted. *Ex parte Orrett*, (1837) 3 Mont. & Ayr., 153. (iii.) A note to this effect:—Received of my brother, Mr. Thomas Mathews, 450*l.*, to be secured by mortgage on my Stoke Hall estate. *Mathews v. Cartwright*, (1742) 2 Atk. 347.

When deeds are deposited with a memorandum, an equitable mortgage may be created by the terms of the memorandum, even where the deeds are insufficient. *Allen v. Southampton*, (1880) 50 L. J. Ch. 218; 16 C. D. 178; *Dixon v. Muckleston*, *supra*.

The Court will decree specific performance of an agreement to execute a mortgage with an immediate power of sale. *Ashton v. Corrigan*, (1871) 41 L. J. Ch. 96; 13 Eq. 76; *Hermann v. Hodges*, (1873) 43 L. J. Ch. 192; 16 Eq. 18.

Immediate power of sale.

In a clear case a mortgagor who has given a written memorandum to execute a legal mortgage will be restrained *pendente lite* from parting with the legal estate. *Spiller v. Spiller*, (1819) 3 Sw. 556; *London and County Banking Co. v. Lewis*, (1882) 21 C. D. 491.

Injunction against parting with legal estate.

The Court treats an equitable mortgage as an agreement by the mortgagor to execute, so far as he can, a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. *Kerr's Policy*, (1869) 8 Eq. 331; *Carter v. Wake*, (1877) 4 C. D. 605; *Sadler v. Worley*, 63 L. J. Ch. 551; [1894] 2 Ch. 170; see p. 54.

The remedy of an equitable mortgagee of title deeds or a policy of insurance is, where there is no memorandum to execute a legal mortgage, foreclosure, *i.e.*, a decree that, in default of payment, the mortgagor will be foreclosed, that the mortgaged premises will be discharged from all equity of redemption, and that a conveyance

Remedy.

from the mortgagor to the mortgagee be executed. *James v. James*, (1873) 42 L. J. Ch. 386; 16 Eq. 153; *Lees v. Fisher*, (1882) 22 C. D. 283; *In re Owen*, 63 L. J. Ch. 749; [1894] 3 Ch. 220.

Where there is such a memorandum, either sale or foreclosure may be asked for. *York Union Banking Co. v. Artley*, (1879) 11 C. D. 205.

In addition to the extinguishment of the equity of redemption, an equitable mortgagee, to gain full relief, requires on a sale or foreclosure a conveyance of the legal estate. *Marshall v. Shrewsbury*, (1875) 44 L. J. Ch. 302; 10 Ch. 250.

Pledges. Personal property may be equitably mortgaged by a deposit of documents which relate to it, but also such documents may be deposited as a pledge. A pledgee may obtain a sale but he cannot obtain a foreclosure. When the transaction is unaccompanied by any memorandum the nature of the property dealt with is in many cases the only evidence whether a pledge or equitable mortgage has been made. The transaction was held to be an equitable mortgage when certificates of shares in a company were deposited as a security for a loan together with blank transfers, when the certificates were deposited without a transfer or memorandum and also when the shares were transferred into the name of the lender. *France v. Clark*, (1884) 52 L. J. Ch. 362; 26 C. D. 257; *London and Midland Bank v. Mitchell*, 68 L. J. Ch. 568; [1899] 2 Ch. 161; *General Credit and Discount Co. v. Glegg*, (1883) 52 L. J. Ch. 297; 22 C. D. 549; *Harrold v. Plenty*, 70 L. J. Ch. 562; [1901] 2 Ch. 314. The deposit of an endorsed bill of lading and of bearer bonds of a railway company has been considered a pledge. *Sewell v. Burdick*, (1884) 54 L. J. Q. B. 126; 10 A. C. 74; *Carter v. Wake*, (1877) 4 C. D. 605.

The distinction between an equitable mortgage and a pledge makes no difference to a mortgagor's right to redeem. In some cases the word pledge has been used as applicable to a security by deposit of certificates of shares, but in none of these cases did the decision turn on the difference between a pledge and an equitable mortgage. *Harrold v. Plenty, supra.*

The borrower's right to redeem negotiable instruments on payment of what is due from him to the lender is subject to the rights in the securities of any person who has received them in good faith and for value from the lender, although the transaction on his part was a fraud on the borrower. *Lord Sheffield's case*, (1888) 13 A. C. 333; *The London Joint Stock Bank v. Simmons*, 61 L. J. Ch. 723; [1892] A. C. 201; *Bentinck v. London Joint Stock Bank*, 62 L. J. Ch. 358; [1893] 2 Ch. 120.

Negotiable instruments.

When the owner of shares deposits, as security for a loan, certificates of his shares, and also transfers signed by him, but with the date and name of the transferee left blank, the lender has implied power to fill up the blanks, and the transfers will pass the legal interest if the articles of association do not require a deed; otherwise only an equitable interest. In such a case the lender cannot delegate to another the power to fill up a transfer for a purpose foreign to the original contract, for such a person necessarily knows that the lender's title may be imperfect. *Re Tahiti Cotton Co., Ex parte Sargent*, (1873) 43 L. J. Ch. 425; 17 Eq. 273; *Ex parte Lancaster, Re Lancaster*, (1877) 46 L. J. Bk. 90; 5 C. D. 911; *France v. Clark, supra.*

Shares.

By 4 & 5 Will. & Mary, c. 16, a mortgagor who executes a mortgage without first discovering in writing, any prior subsisting mortgage affecting the same property, which may have been granted by him, is not entitled to

Suppression of first mortgage, statutory penalty.

redeem the second mortgagee who holds the property as if the transaction had been an absolute purchase.

This Act does not apply when additional property is inserted in the second mortgage, nor unless the second mortgage is in form strictly a mortgage with a proviso for redemption. It simply deprives a mortgagor of his right to redeem, but the second mortgagee cannot initiate proceedings under this Act against a mortgagor. *Stafford v. Selby*, (1707) 2 Vern. 589; *Kennard v. Futroye*, (1860) 29 L. J. Ch. 553.

This Act has rarely been used, and no reported case under it has resulted in the deprivation of the mortgagor of his right to redeem.

Effect of
fraud to
invalidate
the deed.

Fraud may support a plea of *non est factum* if the misrepresentation is as to the nature and character of the deed. A deed is not void, although the parties executing it were misled as to the contents, if they knew that the deed related to the property to which it did relate. If a man knows that the deed deals with his property and he executes it, it will not be sufficient for him, in order to support a plea of *non est factum*, to show that a misrepresentation was made to him as to the contents of the deed. Two sisters of one Jackson, who was a solicitor, executed two conveyances to him of property belonging to themselves in consideration of £700 purporting to be paid to them by him. They were told by Jackson that they were executing two deeds respecting an existing mortgage for £700 on the property, which he said that it was necessary for them to sign in order to deal with that mortgage. Having full confidence in their brother, they signed the deeds relying on his explanation. They were defrauded. They were told that the deeds were of a nature which they were not, but they did understand that the deeds related to their property. It was held

that the plea of *non est factum* could not succeed. *Hunter v. Walters*, (1871) 41 L. J. Ch. 175; 7 Ch. 75; *National Provincial Bank of England v. Jackson*, (1886) 38 C. D. 1; *King v. Smith*, 69 L. J. Ch. 598; [1900] 2 Ch. 425; *Howatson v. Webb*, [1907] 1 Ch. 537.

A legal or an equitable mortgage may be equitably sub-mortgaged by a deposit of the deeds. *Mathews v. Wallwyn*, (1798) 4 Ves. 118; *Jones v. Gibbons*, (1804) 9 Ves. 410; *Bickerton v. Walker*, (1885) 55 L. J. Ch. 227; 31 C. D. 151.

Sub-mort-
gage of
equitable
mortgage.

CHAPTER IV.

PRIORITIES.

General
rule.

THE general rule is that the legal estate, if acquired for value and without notice, cannot be displaced by a prior or subsequent equitable estate, and that as between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity, or *qui prior est tempore potior est jure*. This does not mean that an absolute equality of equity is a condition precedent for arranging the mortgages in order of dates, but that in some cases an inequality of equities may make a later mortgage take precedence of a prior one. *Rice v. Rice*, (1858) 2 Dr. 73.

Advance,
with
knowledge
of prior
advance.

A mortgagee with notice actual or constructive of a prior charge at the time of his own advance has no equity to override that prior charge. The Conveyancing Act, 1882, s. 3, was passed to restrict the doctrine of constructive notice, which had been found to work very grievous injustice. *In re Cousins*, (1886) 55 L. J. Ch. 662; 31 C. D. 671.

It is not possible to define with accuracy what amount of negligence is required to postpone a prior mortgage to one subsequent in date, but the result of the cases seems to be that a greater degree of negligence is required to oust a legal estate than to postpone an equitable estate. See *Taylor v. Russell*, 61 L. J. Ch. 657; [1892] A. C. 244; *Taylor v. London and County Banking Co.*, 70 L. J. Ch. 477; [1901] 2 Ch. 231.

In the one case negligence may be sufficient; in the

other it can only be used as evidence of fraud, or something very much akin to fraud. Lord Eldon was of opinion that a legal estate could be postponed only for "that gross negligence that amounts to fraud." *Evans v. Bicknell*, (1801) 8 Ves. 174; *National Provincial Bank v. Jackson*, (1886) 33 C. D. 1

A legal mortgagee who has advanced his money without knowledge of a prior incumbrance cannot be ousted except for fraud or gross negligence. *Colyer v. Finch*, (1856) 5 H. L. C. 905; *Ratcliff v. Barnard*, (1871) 6 Ch. 652.

A legal mortgagee who has made an advance without notice of a prior equitable title, is a purchaser for value without notice. From such a purchaser a court of equity takes away nothing which he has honestly acquired. *Pilcher v. Rawlins*, (1872) 41 L. J. Ch. 485; 7 Ch. 259; *Heath v. Crealock*, (1874) 44 L. J. Ch. 157; 10 Ch. 22.

According to Lord Lindley the dicta quoted above went too far, and to deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate it is not essential that he should have been guilty of fraud, it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority. *Oliver v. Hinton*, 68 L. J. Ch. 583; [1899] 2 Ch. 264; *Berwick & Co. v. Price*, 74 L. J. Ch. 249; [1905] 1 Ch. 632.

In all cases the negligence alleged must be serious. A legal or equitable mortgagee obtains by his mortgage an interest in the mortgaged property; to justify depriving him of this requires a strong case. *Cory v. Eyre*, (1863) 1 D. J. & S. 149.

An owner of the legal estate can derive no protection from it, if he knew of the prior equitable incumbrance

before he advanced his money ; even though by the fraud of the mortgagor and without any negligence on his own part he was induced to believe honestly and reasonably that the prior equitable incumbrance had been discharged. *Jared v. Clements*, 72 L. J. Ch. 291 ; [1903] 1 Ch. 428.

Fraud.

Fraud deprives a legal mortgagee of the protection of the legal estate. The statute 27 Eliz. c. 4, makes void against subsequent purchasers, including mortgagees, all covinous and fraudulent conveyances, as when by agreement between mortgagor and mortgagee the mortgage deed is given to the mortgagee, but the title deeds left with the mortgagor, the intent of the whole transaction being that the mortgagor may borrow from other mortgagees without knowledge by them of the first mortgage, and that the first mortgagee may use his mortgage deed to protect himself if difficulties arise.

Enabling
mortgagor
by
delivery of
deeds to
conceal
mortgage.

In a case where the first mortgagee delivered the deeds to the mortgagor in order that he might raise further money on the property, he was postponed, not only to the 15,000*l.*, which he thought would be borrowed from the second mortgagee, but to 50,000*l.* which the mortgagor in fact borrowed by fraudulently concealing the first mortgage. *Perry-Herrick v. Attwood*, (1857) 2 D. G. & J. 21 ; *Brocklesby v. Temperance Building Society*, 64 L. J. Ch. 438 ; [1895] A. C. 173.

The principle of the above cases is not confined to the case of a legal mortgagee handing the title deeds back to the mortgagor. In all cases where deeds or other indicia of title are entrusted to a trustee or agent in order that he may deal with them by way of sale or mortgage in a limited manner, and he sells or mortgages to persons who acted in good faith and in ignorance of

the limitation, such sales or mortgages bind the true owner. *Lloyds' Bank v. Bullock*, 65 L. J. Ch. 680; [1896] 2 Ch. 192; *Rimmer v. Webster*, 71 L. J. Ch. 562; [1902] 2 Ch. 163.

The principle applies as between equitable incumbrances. As when debenture holders with a charge on the property of the company leave the title deeds in the possession of the company subject to a condition that no mortgage shall be made in priority to the debentures, and the company deposits them as a security for a loan. *Re Castell & Brown, Ltd.*, 67 L. J. Ch. 169; [1898] 1 Ch. 315; *Ward v. Valletort Sanitary Steam Laundry*, 72 L. J. Ch. 674; [1903] 2 Ch. 654.

The principle only applies where the legal owner or some predecessor in title has personally been guilty of misconduct or conferred apparent authority. Delivery of the title deeds by the tenant for life of the mortgage debt does not bind the remainderman as against a subsequent incumbrancer, to whom the mortgagor purported to convey the legal estate, which was vested in the tenant for life and remainderman as executors of the original mortgagee. The incumbrancer was ordered to hand the deeds deposited with him to the remainderman. *Re Ingham, Jones v. Ingham*, 62 L. J. Ch. 100; [1893] 1 Ch. 352.

It has been held grossly negligent to hand back the title deeds to the mortgagor, so that by their possession he is able to represent himself as owner of the property free from incumbrances. *Waldron v. Sloper*, (1852) 1 Dr. 193.

There may be a reasonable excuse for handing back the deeds, as when they are returned for a short time only, in order to enable the mortgagor to give an intending purchaser information as to the covenants in a lease.

A long delay in demanding back the deeds from the mortgagor would probably in all cases be inexcusable. *Martinez v. Cooper*, (1826) 2 R. 198 ; *Dowle v. Saunders*, (1865) 34 L. J. Ch. 87.

Dishonest answer to intending lender.

A denial of his mortgage in answer to inquiries from a person who, he knew, was an intending lender, has been held fraudulent, and a ground for postponing a first mortgage. *Ibbotson v. Rhodes*, (1706) 2-Vern. 554.

There is no obligation on a mortgagee to require the title deeds, nor indeed to take any further precautions for his own security than what seem good to him ; but if he neglects ordinary precautions, and in consequence innocent people are deceived by others as to the true state of affairs, he will not be allowed to assert against them those rights of his which could not have been concealed from their knowledge without his gross negligence.

Non-possession of deeds.

Mere non-possession of the title deeds is not necessarily proof of a gross negligence. *Perry-Herrick v. Attwood*, *supra* ; *Roberts v. Croft*, (1857) 2 D. G. & J. 1.

Delay in obtaining the deeds.

If a mortgagee, knowing that at the date of the advance the mortgagor has neither the deeds nor the legal estate, obtains a covenant for the conveyance of the legal estate and surrender of the deeds, when obtained by the mortgagor, delay in enforcing such a covenant may amount to neglect or waiver of his right, and may at least, as between equitable incumbrancers, turn the scale against him in favour of a subsequent equitable incumbrancer in possession of the deeds. *Layard v. Maud*, (1867) 4 Eq. 397 ; *Thorpe v. Holdsworth*, (1868) 7 Eq. 139 ; *Mumford v. Stohwasser*, (1874) 18 Eq. 556 ; *Farrand v. Yorkshire Banking Co.*, (1888) 58 L. J. Ch. 238 ; 40 C. D. 182.

Omission to inquire after the deeds, or in some cases to obtain them, may be evidence, if unexplained, of a design, inconsistent with *bonâ fide* dealing, to avoid

knowledge of the true state of the title. *Agra Bank v. Barry*, (1874) 7 H. L. 135.

Non-inquiry about the deeds may, even in the absence of *mala fides*, amount to sufficient negligence to postpone a legal mortgage to a subsequent equitable incumbrancer. *Lloyds' Banking Co. v. Jones*, (1885) 54 L. J. Ch. 931; 29 C. D. 221; *Marshall v. National Provincial Bank*, (1892) 61 L. J. Ch. 465; *Re Castell & Brown, Ltd.*, 67 L. J. Ch. 169; [1898] 1 Ch. 315.

Non-inquiry about deeds.

Gross negligence will be imputed to the mortgagee if, though he made inquiry for the deeds, he was content with an unreasonable explanation of their absence. *Plumb v. Fluitt*, (1791) 2 Anst. 432; *Dryden v. Frost*, (1836) 3 My. & Cr. 670.

Unreasonable explanation of absence of deeds.

Gross negligence is not imputed where there has been an honest inquiry and a reasonable explanation. *Hewitt v. Loosemore*, (1851) 9 H. 449; 21 L. J. Ch. 69; *Evans v. Bicknell*, (1801) 6 Ves. 174.

It has been held a reasonable explanation, that the deeds were in Ireland (*Agra Bank v. Barry, supra*); or that they should be sent (*Plumb v. Fluitt, supra*); or that the mortgagor was rather busy then and would look for the deed and give it to the mortgagee when he next came to market (*Hewitt v. Loosemore, supra*); or that the deeds were all right in London, and that the mortgagee could have them whenever he liked. *Manners v. Mew*, (1885) 54 L. J. Ch. 909; 29 C. D. 725. In the case of *Hewitt v. Loosemore* a prior equitable mortgagee in possession of the lease was postponed to a subsequent legal mortgagee, who was held to have made reasonable inquiry for the lease. In the case of *Manners v. Mew* a prior legal mortgagee, though he had allowed the deeds to remain out of his possession for nine years, was not postponed to a subsequent equitable mortgagee. In both cases

Reasonable explanation.

the mortgagor was the solicitor acting for the legal mortgagee.

Possession
of title
deeds as
against
legal
estate by
estoppel.

A mortgagor who had no interest in the property fraudulently obtained money on the security of a fictitious lease granted by way of mortgage. His subsequent acquisition of the legal estate did not by estoppel validate the lease already given so as to oust a subsequent incumbrancer who had obtained the title deeds and advanced his money in good faith after the acquisition of the legal estate by the mortgagor. *Keate v. Phillips*, (1881) 50 L. J. Ch. 664; 18 C. D. 560.

Mortgagee
entitled to
believe
mort-
gagor.

A mortgagee acting *bonâ fide* is entitled to believe a statement of the mortgagor, and is not fixed with constructive notice through the mortgagor when he is a solicitor and the only person professionally employed. *Roberts v. Croft*, (1857) 2 De G. & J. 1.

The mortgagee, if he *bonâ fide* believes a statement that the deeds are in a parcel handed to him, is not obliged to examine the deeds, nor is he fixed with constructive notice of any deficiency which their examination would have disclosed. *Dixon v. Muckleston*, (1872) 8 Ch. 155; *In re Ingham, Jones v. Ingham*, 62 L. J. Ch. 100; [1898] 1 Ch. 352.

Construc-
tive notice
of deeds
being de-
posited as
a security.

But when the deeds are deposited at a bank by way of security, and a mortgagee is informed by the mortgagor that the deeds are at the bank and takes a conveyance of the property without inquiry of the bank, he is fixed with constructive notice of the prior incumbrance. *Maxfield v. Burton*, (1873) 17 Eq. 15.

Extension
of right to
postpone.

The equity to postpone a legal mortgagee who has negligently omitted to inquire for and obtain the title deeds is not confined to an equitable mortgagee in possession of the deeds, but extends to every incumbrancer who has inquired into the matter and *bonâ fide* advanced

his money. *Perry-Herrick v. Attwood*, (1857) 2 De G. & J. 21; *Clarke v. Palmer*, (1882) 51 L. J. Ch. 534; 21 C. D. 124.

Conduct which is not in itself grossly negligent is not a cause of postponement merely because a subsequent incumbrancer, who has taken every precaution, would not have been deceived if the first had been more careful.

A legal mortgagee of two properties, A. and B., received a parcel said to contain the deeds of both; in fact it only contained the deeds of A.; a subsequent purchaser of B. took every precaution and received the deeds of B., yet the legal mortgage was not postponed. *Hunt v. Elmes*, (1860) 30 L. J. Ch. 255; 2 D. F. & J. 578.

No mere absence of activity on the part of an equitable incumbrancer in asserting his rights postpones his incumbrance. Certainly not a mere neglect of precautions against future fraud, where the mortgagor is in no default, and has given no cause for suspicion. *Bradley v. Riches*, (1878) 9 C. D. 189; *Rooper v. Harrison*, (1855) 2 K. & J. 86; *Union Bank of London v. Kent*, (1888) 57 L. J. Ch. 1022; 39 C. D. 238.

Mortgagees will be postponed when they arm the mortgagor with an instrument of fraud, as when they sign and hand to him receipts for money not in fact received. *Rice v. Rice*, (1853) 2 Dr. 73; *Hunter v. Walters*, (1871) 7 Ch. 75; *Bickerton v. Walker*, (1885) 55 L. J. Ch. 227; 31 C. D. 151; *Bateman v. Hunt*, 73 L. J. K. B. 782; [1904] 2 K. B. 530.

Equitable mortgagors leaving in the hands of a mortgagee, on payment off of the debt, the memorandum of deposit, but receiving the title deeds, are not so negligent as to be answerable to a person to whom the mortgagee has transferred the memorandum for valuable

consideration. *Allen v. Southampton*, (1880) 50 L. J. Ch. 218; 16 C. D. 178.

Notice by
occupa-
tion.

Among the precautions usually adopted by mortgagees before advancing their money is an inspection of the land in order to judge the value and to ascertain that the actual ownership is in accordance with the paper title. A mortgagee omitting this inquiry is held to have notice of all those rights which he must have known if he had inspected the land. If people are in occupation of the land he is bound to make inquiries of them as to their rights. The occupation of land by a tenant affects a mortgagee of land with constructive notice of all that tenant's rights, but not with notice of his lessor's title or rights. Actual knowledge by the purchaser that the rents of the land are paid by the tenants to some person whose receipt of them is inconsistent with the title of the mortgagor is constructive notice of that person's rights; but mere knowledge that the rents are paid to an estate agent affects the mortgagee with no notice at all. Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3; *Hunt v. Luck*, 71 L. J. Ch. 239; [1902] 1 Ch. 428.

Negli-
gence to
give notice
of mort-
gage on
realty
may be
ground of
postpone-
ment.

Omission by an equitable incumbrancer of realty or chattels real to give notice of his mortgage to the legal holder of the property, though such notice is not necessary to complete his security, may be such negligence as to cause postponement; as, for example, in a case where he has reason to suppose that the mortgagor intends to obtain and make an improper use of the legal estate. *Layard v. Maud*, (1867) 4 Eq. 397; *Mumford v. Stohwasser*, (1874) 18 Eq. 556; *Union Bank of London v. Kent*, *supra*.

Property
standing
in name of
a trustee.

When investments are standing in the name of a sole trustee, it is not necessarily negligent to leave the certificate of the shares with him. *Shropshire Union*

Railways and Canal Co. v. Reg., (1875) 45 L. J. Q. B. 31; 7 H. L. 496.

A conveyance of the legal estate by the trustee to an innocent purchaser for value without notice would bind the true owner; but when the trustee fraudulently makes an equitable title to an innocent person for value, the true owner is not postponed on the ground of negligence, or of arming the trustee with the means of fraud by entrusting him with the deed; but *quære*, when the deed contains a recital that the purchase-money has been paid by the trustee and the equitable incumbrancer acted on the faith of that recital. *Carritt v. Real and Personal Advance Co.*, (1889) 58 L. J. Ch. 688; 42 C. D. 263.

The true owner is postponed, if in such a case he has been the transferor to the trustee and has in the deed stated that the purchase-money has been paid to himself by the trustee. *Rimmer v. Webster*, 71 L. J. Ch. 562; [1902] 2 Ch. 163.

Although it has been held grossly negligent to hand the title deeds to the mortgagor, there is no negligence in allowing them to remain in the custody of a trustee or of a person whose ordinary duty it is to hold deeds, as, for instance, a solicitor, whom there is no reason to distrust. *Waldron v. Sloper*, (1852) 1 Dr. 193; *In re Vernon, Ewens & Co.*, (1886) 56 L. J. Ch. 12; 33 C. D. 402.

Leaving deeds with trustee or solicitor.

When the legal estate in property is vested in a trustee, the simple fact that his *cestui que trust* is ignorant of what he is doing gives him no prior equity over any person who has dealings with the trustee and who is equally ignorant of the existence of the trust and of the rights of the *cestui que trust*. This statement of the law has been followed in a case where the negligence of the trustees consisted in not obtaining the title deeds, but it is more doubtful if it would be followed in a case where

Negligence of trustee, position of *cestui que trust*.

the *cestui que trust* may fairly assume that the trustees will do their duty. *Lloyds' Banking Co. v. Jones*, (1885) 29 C. D. 221; *Walker v. Linom*, [1907] 2 Ch. 104.

In the above case the second incumbrancer thought that he was obtaining the legal estate; the case might be different, if the second incumbrancer had been content to take an equitable estate, because he would have known that he took subject to whatever equities there might be, although he reasonably thought that the property was free from equities.

A distinction has been drawn between a sale by a person who appears to be an absolute owner, but is in fact a trustee, as in *Carritt v. Real and Personal Advance Co.*, *supra*, and a sale by a trustee of a power of sale. In the latter case, if the sale is a real transaction, the *cestuis que trust* are bound. *Lloyds' Bank v. Bullock*, 65 L. J. Ch. 680; [1896] 2 Ch. 192.

In *Lloyds' Bank v. Bullock*, a trustee for sale, who intended to sell, but had not received the purchase-money, innocently but carelessly executed a conveyance containing a proper receipt for the purchase-money, and the purchaser subsequently deposited the deed with an equitable mortgagee without notice of any vendor's lien. Both the vendor and his *cestui que trust* were postponed to the mortgagee. Where a trustee for sale, as a device to obtain control of the property, executed a conveyance with a proper receipt to a person who paid nothing, and this person deposited the deed with a mortgagee who had no notice of any breach of trust, or that the purchase-money had not been paid, it was held that the equity of the *cestui que trust* was as good as that of the mortgagee, and being prior in time must prevail. *Capell v. Winter*, [1907] 2 Ch. 376.

A bank holding a legal mortgage from their own bank

manager deposited the deeds in their safe, of which the manager had the key; their mortgage was held entitled to priority over an equitable mortgage created by the manager, after abstracting the deeds from the safe. *Northern Counties of England Fire Insurance v. Whipp*, (1884) 53 L. J. Ch. 629; 26 C. D. 482.

The cases showing under what circumstances non-possession of the deeds and non-inquiry for them may postpone a legal mortgage to an equitable one, are summarized in the judgment of the Court of Appeal in *Northern Counties of England Fire Insurance Co. v. Whipp*. Summary.

- (1.) Where the legal mortgagee or purchaser has made no inquiry for the title deeds and has been postponed, either to a prior equitable estate, as in *Worthington v. Morgan*, (1849) 16 S. 547, or to a subsequent equitable owner, who used diligence in inquiring for the title deeds, as in *Clarke v. Palmer*, (1882) 51 L. J. Ch. 634; 21 C. D. 124.
- (2.) Where the legal mortgagee has made inquiry for the deeds and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett v. Weston*, (1806) 12 Ves. 130; *Hewitt v. Loosemore*, (1851) 9 H. 449; *Agra Bank v. Barry*, (1874) 7 H. L. 135.
- (3.) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all, and has accordingly not lost his priority, as in *Hunt v. Elmes*, (1860) 30 L. J. Ch. 634; 2 D. F. & J. 578; *Ratcliffe v. Barnard*, (1871) 6 Ch. 652; *Colyer v. Finch*, (1856) 3 H. L. C. 905.
- (4.) Where the legal mortgagee has left the deeds in the hands of the mortgagor, with authority to deal with them for the purpose of his raising money on

security of the estate, and he has exceeded the collateral instructions given to him. In these cases the legal mortgagee has been postponed, as in *Perry-Herrick v. Attwood*, (1857) 2 De G. & J. 21.

The cases where the mortgagee, having received the deeds, has subsequently parted with them, or suffered them to fall into the hands of the mortgagor, will be found to fall into the following classes :—

- (1.) Where the title deeds have been lent by the legal mortgagee to the mortgagor, upon a reasonable representation made by him as to the object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities. *Peter v. Russell*, or *Thatched House Case*, (1716) 1 Eq. Ca. Abr. 321; *Martinez v. Cooper*, (1826) 2 Russ. 198.
- (2.) Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee. *Briggs v. Jones*, (1870) 10 Eq. 92; *Jones v. Ingham*, 62 L. J. Ch. 100; [1893] 1 Ch. 352. In such cases the Court has, on the ground of authority, postponed the legal to the equitable estate. This is the same in principle as the decision in *Perry-Herrick v. Attwood*.

Legal
estate,
omission
to obtain
title
deeds.

It has been held that a prior legal estate can be postponed to a subsequent equitable estate in the absence of fraud, on account of conduct that makes it inequitable to rely on the legal estate, and that any conduct of the holder of the legal estate in relation to the deeds which would make it inequitable for him to rely on his legal

estate against a prior equitable estate of which he had no notice, ought also to be sufficient to postpone him to a subsequent equitable estate, when its creation has been rendered possible only by the possession of deeds which but for such conduct would have passed into the possession of the owner of the legal estate. *Walker v. Linom*, [1907] 2 Ch. 104.

Prior to the Judicature Acts a Court of equity never took away from a purchaser for value without notice anything which he had honestly acquired, but since those Acts the Court has power to decide on legal as well as equitable claims and at the instance of a legal owner a Court of equity may now order an equitable incumbrancer to deliver up deeds which he had acquired honestly for value and without notice. *Heath v. Crealock*, (1874) 44 L. J. Ch. 157 ; 10 Ch. 33 ; *In re Cooper*, (1882) 51 L. J. Ch. 862 ; 20 C. D. 611 ; *Manners v. Mew*, (1885) 29 C. D. 725 ; *Jones v. Ingham*, *supra* ; *Taylor v. London and County Banking Co.*, 70 L. J. Ch. 477 ; [1901] 2 Ch. 231.

Legal owner may recover title deeds from innocent equitable incumbrancer.

TACKING.

The priority of equitable incumbrances, according to their date, may be interfered with by the doctrine of tacking.

Tacking.

This doctrine is found upon the importance of the legal estate. Where all the incumbrancers have equally *bonâ fide* advanced their money, it is considered that there is no equity to take the legal estate from him who has it, except on payment of all that is due to him ; therefore, where the security is deficient, those who have not the legal estate are liable to be squeezed out.

Founded on legal estate.

As against the mortgagor this doctrine means only that the security cannot be redeemed until all the debts are paid.

As against mortgagor.

As against puisne incumbrancers it has two applications.

As against puisne

mort-
gagees.

First, the legal mortgagee, having no notice of any mortgages on the equity of redemption, makes a further advance, and then tacks to his legal estate this further advance. If tacking were prevented it is difficult to see how further advances could be safely made.

*Tabula in
naufragio.*

Secondly, a person who advances his money on an equitable security can protect himself against puisne mortgagees of which he had no notice at the time of the advance, by taking an assignment of the legal estate. This portion of the doctrine is sometimes called *tabula in naufragio*.

No advances made with notice of intermediate incumbrances can be tacked to the legal estate.

Notice to
one of
joint
tenants
prevents
tacking.

Where a mortgage of real estate is vested in joint tenants to secure a joint debt, notice to one of them of a second incumbrance prevents the joint tenants or the survivors of them from tacking. *Freeman v. Laing*, 68 L. J. Ch. 586 ; [1899] 2 Ch. 355.

Mortgages
to secure
future
advances.

A provision in a mortgage, that the security should cover future advances, is good as against the mortgagor, but gives the first mortgagee no equity to postpone advances made by a second mortgagee with notice of the first to advances made by the first mortgagee after notice of the second mortgage. *Hopkinson v. Rolt*, (1861) 34 L. J. Ch. 468 ; 9 H. L. C. 514, 468 ; *Daun v. City of London Brewery Co.*, (1869) 8 Eq. 155 ; *Menzies v. Lightfoot*, (1871) 11 Eq. 459 ; *Bradford v. Briggs*, (1886) 12 A. C. 29 ; *London and County Banking Co. v. Ratcliffe*, (1881) 51 L. J. Ch. 28 ; 6 A. C. 722 ; *Union Bank of Scotland v. National Bank of Scotland*, (1886) 12 A. C. 53.

Even if
mortgagee
is bound
to make
further
advances.

It is immaterial that the first mortgagee has contracted to make the further advance, if he has so contracted the making of a second mortgage on the same property by the mortgagor releases him from this covenant. The principle

of the rule in *Hopkinson v. Rolt* is that when a man mortgages his property, he is still free to deal with the property subject to the mortgage; nor can anyone who knows of the second mortgage obtain from the mortgagor a greater right to override it than the mortgagor himself has. Also the first mortgagee has no right to restrain the mortgagor from borrowing from some one else and giving him a second mortgage subject to the first. *West v. Williams*, 68 L. J. Ch. 127; [1899] 1 Ch. 132.

If the mortgage is made expressly to secure further advances, these, when made, take priority over mesne incumbrances, though the security be only equitable, assuming that the further advances were made without notice. *Calisher v. Forbes*, (1871) 7 Ch. 109. In this case the security was personalty, and all the notices to the trustees were given simultaneously.

The doctrine of *tabula in naufragio* was established in the case of *Marsh v. Lee*, White & Tudor. The facts were, so far as is material: English being seised of a manor mortgaged it to Burrell and afterwards to Duppa, and afterwards to Lee, who had no notice of the two former mortgages. An action of foreclosure was commenced by Duppa's executors against English. On the 26th of November, 1668, the Master reported the amount at which the estate should be redeemed, or, in default, foreclosed. On the 27th of November, 1668, Lee purchased Burrell's mortgage and procured a conveyance of the legal estate, having then notice of Duppa's mortgage. It was held that Lee might make use of the legal estate to protect his own mortgage. *Tabula in naufragio.*

The doctrine was thus stated by Sir Joseph Jekyll in *Brace v. The Duchess of Marlborough*, (1728) 2 P. Wms. 491:— Statement by Sir Joseph Jekyll.

“If a third mortgagee buys in the first mortgage,

though it be, *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee, having obtained the first mortgage, and got the law on his side and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice Hale called a 'plank' gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*."

By Lord
Selborne.

Lord Selborne thus describes this doctrine :—

"There is nothing more familiar than the doctrine of equity that a man who has *bonâ fide* paid money without notice of any other title, though, at the time of the payment, he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title, if he can, and may hold it, though during the interval between the payment and the getting in the legal estate he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself. *Blackwood v. London Chartered Bank of Australia*, (1874) 5 P. C. 92, at p. 111.

So, Lord Keeper North (*Edmunds v. Povey*, (1683) 1 Vern. 187), and Lord Hardwicke. *Wortley v. Birkhead*, (1754) 2 Ves. sen. 571.

Convey-
ance of
legal
estate by
a trustee.

In the present state of the authorities it is not clear how far a conveyance of the legal estate by a trustee in breach of his duty and without consideration is operative to give protection to a *bonâ fide* incumbrancer who, at the time of the conveyance of the legal estate, knew of the prior incumbrancer, but had no knowledge of the trusteeship. *Powell v. London and Provincial Bank*, 62 L. J. Ch. 795; [1898] 1 Ch. 610.

"Nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim." *Harpham v. Shacklock*,

(1881) 19 C. D. 207; *Mumford v. Stohwasser*, (1874) 18 Eq. 556.

From the judgment of the House of Lords in *Taylor v. Russell*, 61 L. J. Ch. 657; [1892] A. C. 244, it may be inferred that they would agree with the above view only where the subsequent incumbrancer knew of the trusteeship. At any rate the trustee must be an express trustee for the person against whom the legal estate is sought to be set up (*Taylor v. Russell*); such as a bare trustee (*Prosser v. Rice*, (1859) 28 B. 74); or a mortgagee who has been paid off (*Maundrell v. Maundrell*, (1805) 10 Ves. 246); not an unsatisfied mortgagee.

A mortgagee obtaining the legal estate from a person who was the survivor of the trustees of a will and also beneficially entitled, subject to the trusts of the will, to part of the real estate in fee simple, was postponed to a prior equitable mortgage by the mortgagor of his interests under the will. *Perham v. Kempster*, 76 L. J. Ch. 223; [1907] 1 Ch. 373.

Notice to the subsequent incumbrancer of the prior incumbrance when he gets in the legal estate counts for nothing. "It is," as Lord Hardwicke says, "the very occasion which shows the necessity for it." *Wortley v. Birkhead*, (1754) 2 Ves. sen. 471; *Robinson v. Davison*, (1779) 1 Bro. C. C. 63; *In re Russell Road Purchase Monneys*, (1871) 12 Eq. 78; *Bailey v. Barnes*, 63 L. J. 73; [1894] 1 Ch. 25.

This observation would seem to apply equally when the subsequent incumbrancer gets in the legal estate from a person who is, though unknown to him, in fact a trustee for another person.

A subsequent mortgagee who obtained the legal estate at a time when he had constructive notice of the prior mortgage, was held to obtain no protection thereby, but

the case was a very peculiar one. *Allen v. Knight*, (1846) 5 H. 272.

A mortgagor is not a trustee for the mortgagee (*Taylor v. Russell*, *supra*); but he cannot, by taking an assignment of a mortgage, tack against an incumbrance created by himself. *Ledbrook v. Passman*, (1888) 57 L. J. Ch. 855.

Legal
estate
acquired
under
power of
attorney.

Where a mortgagee takes an equitable mortgage with a memorandum, by which the mortgagor declares himself a trustee and gives the mortgagee a power to appoint a new trustee, he can exercise this power and obtain the legal estate to the exclusion of an equitable incumbrancer prior in time of whom he had no notice when he made his advance, unless when he obtained the legal estate he knew that his mortgagor would have committed a breach of trust by conveying it to him. *London & County Banking Co. v. Goddard*, 66 L. J. Ch. 261; [1897] 1 Ch. 642; *Taylor v. London & County Banking Co.*, [1901] 70 L. J. Ch. 477; 2 Ch. 231.

Convey-
ance for
value.

A conveyance of the legal estate in breach of his duty by an express trustee to one who had no notice of the trusteeship would give protection, if for valuable consideration. *Carter v. Carter*, (1857) 3 K. & J. 617; *Pilcher v. Rawlins*, (1872) 41 L. J. Ch. 485; 7 Ch. 259.

A fortiori, an equitable incumbrancer, by a legal estate acquired in pursuance of a contract made prior to the mesne incumbrance, can protect himself against such incumbrance. *Cooke v. Wilton*, (1860) 29 B. 100.

Advances
made by
a trustee.

A trustee can tack advances of his own against an advance made by his *cestui que trust*, and a trustee who has made advances to his *cestui que trust* without notice of a prior charge can protect himself by subsequently obtaining the legal estate. *Wilmot v. Pike*, (1845) 5 H. 14; *Newman v. Newman*, (1885) 28 C. D. 674.

A second incumbrancer, by making inquiries from the first mortgagee and fixing him with notice of the second mortgage, does not make him a trustee for him, so as to prevent him from receiving his money from and conveying the legal estate to a third mortgagee, who, when he made his advance, had no notice of the second mortgage (*Peacock v. Burt*, (1834) 4 L. J. Ch. 33), in spite of Lord Eldon's doubts expressed in *Mackreth v. Symmons*, (1806) 15 Ves. 335.

First mortgagee is not a trustee for a second.

"If a second and a third mortgagee are both equally desirous of redeeming the first, the first mortgagee has it in his power, if he be so minded, to give the preference to which of the two he pleases." *Bates v. Johnson*, (1859) Johns. 304; *Hawkins v. Taylor*, (1687) 2 Vern. 29; *Belchier v. Butler*, (1760) 1 Eden, 523. *Peacock v. Burt* and *Bates v. Johnson* were adversely criticised by the Lords Justices in *West London Commercial Bank v. Reliance Permanent Building Society*, (1885) 54 L. J. Ch. 1081; 29 C. D. 954.

Right to squeeze out second mortgage.

These cases, it is submitted, do not show that the power to prefer the third to the second mortgagee would continue after a sufficient tender by the second mortgagee.

Tacking is not possible after a decree settling the priorities (*Ex parte Knott*, (1806) 11 Ves. 619); after the fund has become distributable (*Calisher v. Forbes*, (1871) 41 L. J. Ch. 56; 7 Ch. 109); nor where the legal estate and the equitable incumbrance are not held by the same person, and in the same right (*Morrett v. Paske*, (1740) 2 Atk. 53; *Barnett v. Weston*, (1806) 12 Ves. 130).

When tacking no longer possible.

It is sufficient if the rights are substantially the same, as where a man held the one absolutely and the other as trustee, but with the beneficial interest vested in himself. *Spencer v. Pearson*, (1757) 24 B. 266; *Price v. Fastnedge*, (1769) Ambl. 685.

Legal estate traced through deed showing conflicting equities.

It is immaterial that the legal estate has been obtained by an accident, or that where obtained in some other way than that originally intended it is necessary to trace the title through a deed which discloses conflicting equities. *Carter v. Carter*, (1857) 3 K. & J. 617; *Pilcher v. Rawlins*, (1872) 7 Ch. 259; *Sharples v. Adams*, (1863) 32 B. 213; *Maxfield v. Burton*, (1873) 17 Eq. 15.

The legal estate, honestly obtained, protects an advance made on the security of the estate, even to a person whose only title is possession, as under a forged will or by a false pretence of being heir. *Jones v. Powles*, (1834) 3 My. & K. 581; *Young v. Young*, (1867) 3 Eq. 801.

How far possession of legal estate is essential.

The power to tack given by possession of the legal estate lasts only while the legal estate is retained. *Rooper v. Harrison*, (1855) 2 K. & J. 86.

Actual possession of the legal interest is not always necessary. Where a purchaser, not having got in an outstanding legal estate, has nevertheless the best right to call for it, he will in equity be entitled to its protection. *Maundrell v. Maundrell*, (1805) 10 Ves. 271; *Ex parte Knott*, *supra*; *Bowen v. Evans*, (1844) 1 J. & L. 264; *Parker v. Carter*, (1844) 4 H. 410.

No case seems to have been decided on this ground. It apparently means that where the legal estate is outstanding, a prior incumbrancer who has done nothing may be postponed to one who has obtained an express declaration of trust on his behalf from the legal holder of the property.

It is doubtful if the best right to call for the legal estate can in all cases be equal to the possession of the legal estate.

Where an equitable owner executed an equitable charge to A., and covenanted to execute a legal mortgage in his favour, and then procured a conveyance of the legal estate

to himself, and made a legal mortgage to B. without notice of the prior charge, B. was held entitled to the protection of his legal estate. *Garnham v. Skipper*, (1885) 55 L. J. Ch. 263.

Debts which can be tacked are—

(1) Debts which are secured on the land, such as second mortgages; *secus*, a charge on the sale moneys of the land under a contract. *Lacey v. Ingle*, (1847) 2 Ph. 413.

Debts which are a charge on the land.

(2) Judgment debts.

Judgment debts.

Prior to 1 & 2 Vict. c. 110, a mortgagee could tack to his mortgage a subsequently-acquired judgment debt; but a holder of a judgment debt could not tack by getting in a legal estate. *Brace v. Duchess of Marlborough*; *Ex parte Knott*; *Lacey v. Ingle*, *supra*.

1 & 2 Vict. c. 110.

The reason given for excluding a judgment creditor from tacking was that he had no specific lien. A specific lien was given by 1 & 2 Vict. c. 110; by subsequent Acts, the remedies of a judgment creditor were gradually cut down, until by 27 & 28 Vict. c. 112, it was enacted that no judgment should affect any land of whatever tenure until such land should have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority, in pursuance of such judgment. It may therefore be argued that a judgment creditor to whom the land has been actually delivered, having a lien, can tack that judgment to a legal estate which he subsequently acquires, as against incumbrances intermediate between the judgment and the mortgage. *Guest v. Cowbridge Rail. Co.*, (1868) 6 Eq. 619.

27 & 28 Vict. c. 112.

Now, by the Land Charges Act, 1900, a judgment does not operate as a charge on land or on any interest in land unless or until a writ or order for the purpose of enforcing it is registered under sect. 5

63 & 64 Vict. c. 26.

of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51).

As to the appointment of a receiver being other lawful authority, see *Anglo-Italian Bank v. Davies*, (1878) 47 L. J. Ch. 843, 9 C. D. 275; *Ex parte Evans, Re Watkins*, (1879) 49 L. J. Bk. 7; 13 C. D. 252; *Atkins v. Shephard*, (1889) 59 L. J. Ch. 83; 43 C. D. 131.

Tacking is not possible against a judgment creditor to whom the land has been actually delivered in execution under a writ of *elegit*. *Champneys v. Burland*, (1870) 19 W. R. 148.

Specialty
and simple
contract
debts.

Neither specialty nor simple contract debts can be tacked against the mortgagor, but where the mortgagor is solvent, to avoid circuity of action the mortgagee can refuse to be redeemed except on payment of all that is due to him.

A charge
on assets
of de-
ceased
mort-
gagor.

On the mortgagor's death, both specialty and simple contract debts, by 3 & 4 Will. IV. c. 104 and 32 & 33 Vict. c. 46, become a charge on all his real and personal estate, and therefore can be tacked against the heir, devisee, or executor, when the equity of redemption is in their hands as assets for the payment of debts. *Rolfe v. Chester*, (1855) 20 B. 613; *Irby v. Irby*, (1855) 22 B. 217.

This kind of tacking is not permitted to the prejudice of other creditors having a like charge on the assets. *Re Haselfoot's Estate*, (1872) 13 Eq. 327; *Talbot v. Frere*, (1878) 9 C. D. 568; *Christison v. Bolam*, 57 L. J. Ch. 221; 36 C. D. 223.

See further on this point, p. 200.

Sect. 7 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), abolishing tacking, was repealed in 1875 (38 & 39 Vict. c. 87, s. 129).

In register
county.

Tacking is not prevented in a register county by

registration of the mesne incumbrance in the absence of notice. *Morecock v. Dickson*, Amb. 678; *Cator v. Cooley*, (1785) 1 Cox, 182.

But, with regard to lands in Yorkshire, tacking has been abolished by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 14 and 16.

Sect. 15 of the above Act, making registration notice, has been abolished by the Yorkshire Registries Act, 1885 (48 & 49 Vict. c. 26), s. 5.

Tacking is not expressly dealt with by the Land Transfer Acts, 1875 and 1897.

Further advances cannot be tacked against a surety in prejudice of his right on payment of the debt to have a transfer of all the securities, that is to say, the surety on payment of the debt for which he is liable, is entitled to a transfer of the securities for that debt, and to say that the further charges for the sums subsequently advanced are inoperative as against him. *Forbes v. Jackson*, (1882) 19 C. D. 615; following *Newton v. Chorlton*, (1853) 10 H. 646; and not following *Williams v. Owen*, (1843) 13 S. 597.

The equity of a surety for one of two mortgage debts already secured to deprive the mortgagee of a right to tack or consolidate is doubtful, especially in the case of a person who has expressly covenanted that as between himself and the mortgagee he is to be regarded as a principal. *Farebrother v. Wodehouse*, 26 L. J. (Ch.) 1240; 23 B. 18; *Nicholas v. Ridley*, 73 L. J. 145; [1904] 1 Ch. 192.

A recital in the mortgage deed that a person, who really joined as a surety, is a part owner of the mortgaged property and a stipulation that the surplus of a sale was to be paid partly to him may estop him from claiming as against the second mortgagee to stand in the place of the

Under
Land
Transfer
Acts.
Tacking
for future
advances
against
surety.

For debts
already
secured.

first mortgagee to the extent of the sums which he had been compelled to pay to the first mortgagee. *In re Davison*, (1893) 31 L. R. Ir. 249.

CONSOLIDATION.

Consolidation.

A mortgagor, who has separately mortgaged two properties to the same mortgagee, will not be allowed in equity, after the properties have become vested in law in the mortgagee, to redeem one of the properties except upon condition of paying off the other mortgage debt, which may be insufficiently secured. *Cummins v. Fletcher*, (1880) 14 C. D. 699.

Against assignees whose assignments are subsequent to right of consolidation.

This rule is extended to cases when the equities of redemption have been assigned to different persons, if the assignments are made after the right to consolidate has once arisen. This extension is justified on the ground that the right of the mortgagee to hold both properties for the aggregate of the debts cannot be taken away by assignments of the equities of redemption.

It is also extended to cases where the mortgages were originally made to different persons, and have become, by subsequent assignments, vested in the same person.

Assignments prior to creation of second mortgages.

It is not extended to assignees of the equities of redemption whose assignments are prior to the existence of a right to consolidate; *i.e.*, assignees take subject to the existing equities, but not subject to the possibility of the future equities arising; that is—

- (1) Against an assignee of the equity of redemption of the first mortgage, if the assignment was prior to the creation of the second mortgage. *Pope v. Onslow*, (1692) 2 Vern. 286; *Titley v. Davies*, (1748) 2 Y. & C. Ch. 399; *White v. Hillacre*, (1839) 3 Y. & C. Ex. 597; *Baker v. Gray*, (1875) 1 C. D. 491; *Jennings v. Jordan*, (1880) 51 L. J.

Ch. 129; 6 A. C. 698; *Hughes v. Britannia Benefit Building Society*, 75 L. J. Ch. 739; [1906] 2 Ch. 607.

- (2) Against an assignee of an equity of redemption, if the assignment was prior to the union of the two mortgages in the same person, though it may be subsequent to the creation of the two mortgages. *Assignments prior to union of first mortgages.*
Harter v. Coleman, (1882) 51 L. J. Ch. 481; 19 C. D. 630; following *White v. Hillacre*, *supra*; and overruling *Beevor v. Luck*, (1867) 4 Eq. 537; *Minter v. Carr*, 68 L. J. Ch. 755; [1894] 3 Ch. 495; *Riley v. Hall*, (1898) 79 L. T. 244.

Consolidation does not apply :—

- (1) Until the mortgagor's estate is forfeited at law, and therefore only applies where default has been made on all the securities in respect of which it is claimed. *Cummins v. Fletcher*, *supra*; *Chesworth v. Hunt*, (1880) 5 C. P. D. 266. *Before default.*
- (2) Where the mortgagor, though he might be the same person, made the mortgages sought to be consolidated in different rights. *Cummins v. Fletcher*, *supra*. *Mortgages made in different rights.*
- (3) Against volunteers, even prior to the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21). The statute of 27 Eliz. c. 4, made a voluntary settlement void as against a subsequent mortgagee, but only to the extent of the purchaser's interest therein. *Walhampton Estate*, (1844) 26 C. D. 391. The voluntary settlement was subject to the mortgage debt expressly charged on that estate, but not to the debt which might be thrown on it by the doctrine of consolidation. *Volunteers.*
- (4) In mortgages made after 1881, unless a contrary intention is expressed. *Since 1881.*

Conveyancing Act, 1881, s. 17.—“(1) A mortgagor seeking to redeem any one mortgage shall by virtue of this Act be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

“(2) This section applies only if and so far as a contrary intention is not expressed in the mortgage deeds or one of them.”

If any one of the mortgage deeds in the hands of the mortgagee sought to be redeemed contains a contrary intention, it would seem that the parties are thrown back on the law as it existed prior to the Act, so that such a clause in a subsequent mortgage prevents the redemption of a former mortgage alone which does not contain the clause. *Griffith v. Pound*, (1889) 45 C. D. 553; *Bird v. Winn*, (1886) 33 C. D. 215; *Whitley v. Challis*, 61 L. J. 307; [1892] 1 Ch. 64; *In re Salmon*, 72 L. J. K. B. 125; [1903] 1 K. B. 147.

A clause excluding the operation of sect. 17 is frequently inserted in mortgages, but it must be the subject of special contract, and cannot be inserted in a mortgage executed according to a memorandum if that contains no express contract for the purpose. *Farmer v. Pitt*, 71 L. J. Ch. 500; [1902] 1 Ch. 954.

Costs.

A mortgagor of two estates, the mortgages on which would have been consolidated but for the Conveyancing Act, was by the decree in a foreclosure action declared entitled to redeem either estate on payment of the debt secured on it and all the costs of the action. *Clapham v. Andrews*, (1884) 27 C. D. 679; *Andrews v. City Permanent Benefit Building Society*, (1881) 44 L. T. 641. This decision was disapproved of by the Court of Appeal in a

foreclosure action. It was there held that the costs must be borne rateably. *De Caux v. Skipper*, (1886) 31 C. D. 635.

The doctrine of consolidation applies in redemption actions and also in actions whereby the mortgagee endeavours to enforce his rights. *Watts v. Symes*, (1851) 1 D. M. & G. 215; *Cracknall v. Janson*, (1879) 11 C. D. 1.

Consolidation means that neither of the mortgaged properties can be redeemed without payment of the two debts. It does not throw two debts on one property; it therefore is not applicable when one property is destroyed, as a forfeited leasehold; or a life policy fallen in by death. *Re Raggett, Ex parte Williams*, (1880) 16 C. D. 117; *Christison v. Bolam*, (1887) 57 L. J. Ch. 221; 36 C. D. 223.

Destruction of one property.

There is an exception to the rule that consolidation cannot be applied against an assignee whose assignment is prior to the creation of the right to consolidate, namely when more than one equity of redemption has been assigned by the same deed to the same assignee and the mortgages have afterwards become united. This exception is justified on the ground that an assignee of two or more equities of redemption knows that there are in existence several mortgages created by his assignor, and that there is a possibility that they may become united by transfer in one hand. *Vint v. Padget*, (1858) 28 L. J. Ch. 21; 2 De G. & J. 611; *Harter v. Colman*, *supra*; *Pledge v. White*, 65 L. J. Ch. 449; [1896] A. C. 187.

Mortgages united and redeemable by same person.

The difference between tacking and consolidation is this. In tacking the right is to throw several debts, one or more of which are either lent upon inferior securities on the same estate, or are mere specialty debts, upon the protection of the legal estate, the dominion over which

Difference between tacking and consolidation.

is the very foundation of the right; but consolidation depends upon the equitable principle that he who seeks the aid of the Court must do equity himself; and it enables a mortgagee to unite, and hold united, securities on different estates until payment of the debts charged on both of them—to make one estate liable for a debt specifically charged on another.

Knowledge of the intervening security by the person who united the two securities and then asserted his right to consolidate is immaterial. *Vint v. Padget, supra.*

A second mortgagee who sells for a sum insufficient to pay himself and the first mortgagee, and in order to induce the first mortgagee to join in the conveyance is compelled to pay him the amount of an equitable charge upon other property, is a transferee of the equitable charge, and is entitled to consolidate against the mortgagor and to require payment of all that is due to him out of the two properties. *Cracknall v. Janson, supra.*

CONTRIBUTION AND MARSHALLING.

Marshall-
ling.

Where one person has an equal right to resort to two funds, and another person has a right to resort to one only of these two funds, the latter may, under the doctrine of marshalling, claim that, as between himself and the double creditor, the double creditor should be put to exhaust the security upon which the single creditor has no right. *Dolphin v. Aylward*, (1870) L. R. 4 H. L. 486; *Lanoy v. Athol*, (1742) 2 Atk. 444; *Aldrich v. Cooper*, (1808) 2 L. C. Eq. 80; *Webb v. Smith*, (1885) 30 C. D. 192; *Flint v. Howard*, 62 L. J. Ch. 804; [1898] 2 Ch. 54.

Thus, if the two mortgaged funds, when realized, exceed the claim of the double creditor, he holds for the single creditor so much of the surplus as equals the value

of the fund mortgaged to the single creditor, even though that security has been wholly exhausted, and the surplus is derived wholly from the other fund.

A surety of the double creditor, to whom the securities have been assigned, is equally obliged to hand over to the single creditor the surplus (but not exceeding the fund mortgaged to him), irrespective of the question from which fund the surplus comes. *South v. Bloxam*, (1865) 34 L. J. Ch. 369. Surety.

Policy moneys are marshalled in favour of a surety, from whom the debt, secured by one of the policies, has been recovered. *Heyman v. Dubois*, (1871) 13 Eq. 158. In favour of surety.

The doctrine of marshalling, that the caprice of the double mortgagee shall not injure the single mortgagee, is concerned with the rights of incumbrancers, but it may affect the rights of voluntary assignees. If a man who has two real estates, mortgages both to one person and afterwards only one estate to a second mortgagee who had no notice of the first, the Court, in order to relieve the second mortgagee, has directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgagee, even though the estates descended to two different persons. *Lanoy v. Athol*, *supra*. Marshalling may affect voluntary assignee.

The general rule that two or more properties, subject to the same mortgage, contribute rateably is not interfered with by the doctrine of marshalling, as against assignees for value of the assignor. If a mortgagor is entitled to two properties, A. and B., and makes three mortgages of them, the first including both A. and B., the second A. only, and the third both A. and B., then, if A. and B. are realized, the first mortgage is borne rateably; and if A. is wholly exhausted, the second Not applied to prejudice of assignees for value.

mortgagee has no claim against the third. *Barnes v. Racster*, (1842) 1 Y. & C. Ch. 401.

But it is competent to the mortgagor, upon making the third mortgage, to frame it in such a way as to give to the third mortgagee only the surplus of properties A. and B. after payment of the first two mortgages; and then the third mortgagee takes nothing until the prior mortgages are satisfied. *Mower's Trusts*, (1869) 8 Eq. 110.

Instance
of volun-
teers.

A covenant for further assurance in a voluntary settlement of an incumbered property does not imply freedom from existing incumbrances, and gives the beneficiaries under the voluntary settlement no right to be indemnified by any other portion of the settlor's property. *Ker v. Ker*, (1869) 1 R. 4 Eq. 15.

A covenant for further assurance or quiet enjoyment in a voluntary conveyance, in case of a subsequent mortgage, entitles the beneficiaries to have the settlor's properties marshalled and the mortgage discharged out of the unsettled portion of his assets. *Hales v. Cox*, (1864) 32 B. 118; *Mallot v. Wilson*, 72 L. J. Ch. 664; [1903] 2 Ch. 494.

In the above cases the voluntary settlements were, under 27 Eliz. c. 4, avoided against the subsequent mortgages, and marshalling was introduced to compensate the beneficiaries for the injury which they had sustained from the mortgage, but now if made *bonâ fide* they would be valid. The Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21).

At in-
stance of
assignees
for value.

When a man who has two or more properties subject to one mortgage conceals the mortgage and conveys one to an assignee for value, with a covenant for further assurance, or against incumbrances, or a declaration that there are no mortgages, the property so conveyed and the other property while it is in the hands of the mortgagor or a voluntary assignee do not, as between themselves, con-

tribute rateably, but the property so conveyed is entitled to indemnity from the other property. *King v. Jones*, (1814) 5 Taunt. 418; *Farrington v. Forrester*, [1893] 2 Ch. 461; *In re Repington, Wodehouse v. Scobell*, 73 L. J. Ch. 533; [1904] 1 Ch. 811.

Marshalling does not compel a mortgagee to divide his claim if he has a right to the specific security; thus, if estates A. and B. are mortgaged to a first mortgagee, and B. to a second mortgagee, he has no equity to restrain the first from foreclosure; his only remedy is redemption. *Averall v. Wade*, (1835) Ll. & G. 252.

Inapplic-
able to
claim on
a specific
security.

In the above cases of marshalling, a second mortgagee gets the benefit of a fund not included in his security as compensation for the loss of his own security.

When a second mortgagee redeems, he may, by the rule that he is entitled on redemption to all securities for the debt, and by the doctrine of consolidation, get, as pure advantage, the benefit of a fund entirely strange to him.

Effect of
marshal-
ling and
right on
payment
of debt to
take all
securities.

If estates A., B., and C. are mortgaged to E., then estate A. is mortgaged to D., and, subsequently, B. is sold to M. and C. to N., D. is entitled to redeem E. and to hold A., B., and C. for the aggregate of his own debt and of what he paid to E. *Titley v. Davies*, (1743) 2 Y. & C. 399. If the mortgage to E. had been paid off, D. would have become legal mortgagee of A., and yet his position would have been injured, for he would have had no power to redeem B. and C.

Similarly, where A. and B. are mortgaged, then B. to a second mortgagee, and A. and B. to a third mortgagee, the second mortgagee can redeem the first mortgage on A. and B. and hold them for the aggregate of his own debt and that of the first mortgagee. *Mutual Life Assurance v. Langley*, (1886) 32 C. D. 460.

As appears from the note to this case, it was ultimately compromised. It has since been held that in such circumstances the amount due under the first mortgage should be borne rateably by the two properties according to their respective values. *Flint v. Howard*, 62 L. J. Ch. 804; [1898] 2 Ch. 54.

For the method of contribution, *inter se*, of the mortgagors when one mortgaged estate has devolved on different people, or two or more separate estates are liable to the same mortgage, see p. 29.

Need not
be asked
in plead-
ings.

The Court will order securities to be marshalled in a proper case though the pleadings do not ask for it. *Gibbs v. Ougier*, (1806) 12 Ves. 416.

A widow was entitled to two funds for her life. She mortgaged both. On her second marriage, the larger fund became subject to a restraint on anticipation. She then made other mortgages. If the first mortgagees had deducted their interest from the smaller fund it would have been exhausted, and the mortgagor would, under the restraint on anticipation, have enjoyed the income of the larger. It was held that the mortgagees should take their interest out of the larger fund and leave the other to the second mortgagees. *In re Loder's Trusts*, (1886) 56 L. J. Ch. 230.

REGISTRATION OF ASSURANCES.

In a register county where, *primâ facie*, all deeds affecting the property are registered, non-inquiry beyond registered deeds is more capable of explanation than in a non-register county where the purchaser can rely only on the ordinary means of information. A registered subsequent mortgage will not be displaced on the ground of constructive notice. To effect this there must be actual notice by the mortgagee or his agent. *Agra Bank*,

(1874) 7 H. L. 135; *Kettlewell v. Watson*, (1884) 53 L. J. 717; 26 C. D. 501.

Registration *per se* is not notice. *Morecock v. Dickens*, (1768) Amb. 678; *Cator v. Cooley*, (1785) 1 Cox, 182. The earlier cases do not decide under what circumstances failure to search the register may be negligence or evidence of actual notice.

Prior to the Yorkshire Registries Act (1884), if there was any document giving an interest in land it required registration, but the Registry Acts did not apply where there was no document, as in case of an equitable mortgage by deposit of deeds without a memorandum. *Sumpter v. Cooper*, (1831) 2 B & Ad. 223.

Deposit without memorandum prior to 47 & 48 Vict. c. 54.

An unregistered equitable mortgage by deposit of deeds, with a memorandum of deposit, is postponed to a subsequent registered one without notice. *In re Wight's Mortgage Trust*, (1873) 16 Eq. 41; *Credland v. Potter*, (1874) 44 L. J. Ch. 169; 10 Ch. 8; *Greaves v. Tofield*, (1880) 14 C. D. 563; *Kettlewell v. Watson*, *supra*.

Registration in register counties.

Registration does not make a deed of greater efficacy than it was before registration.

- (1) A legal mortgage without notice has priority, though unregistered, over an equitable registered mortgage. *Morecock v. Dickens*, *supra*.
- (2) A first mortgagee, having registered, lent a further sum without notice of a second registered mortgage, and was allowed to tack. *Bedford v. Bachus*, (1730) Amb. 680.
- (3) So, also, a third mortgagee who advanced his money without notice of a second registered mortgage, and then bought in a first mortgage. *Cator v. Cooley*, *supra*.

The above cases refer to the construction of the Middlesex Act, 7 Anne, c. 20, and the Yorkshire Registry Acts.

These latter Acts have been repealed, as from the commencement of 1885, by the Yorkshire Registries Act, 1884, the 7th section of which provides, that where a charge is claimed by reason of any deposit of title deeds, a memorandum of such charge, signed by the person against whom such charge is claimed, may be registered, and no such charge shall have any effect or priority as against any assurance for valuable consideration which may be registered under this Act, unless and until a memorandum thereof has been registered. Sect. 14:—Subject to the provisions of this Act all assurances entitled to be registered under this Act have priority according to the date of registration thereof, and not according to the date of such assurances or of the execution thereof . . . except in cases of actual fraud.

This Act has altered the law as laid down in *Sumpter v. Cooper, supra*, and has deprived equitable mortgagees by deposit of priority over any registered assurance for valuable consideration, unless a memorandum thereof has been registered under the Act, except in cases of actual fraud. *Battison v. Hobson*, 65 L. J. Ch. 695; [1896] 2 Ch. 408.

Actual knowledge of a prior unregistered charge is not proof of actual fraud. When a mortgagee does not stand in such a relation to a prior incumbrancer, that there is a duty on him not to injure his charge, he is not necessarily prevented from obtaining by registration priority over an incumbrancer, who being entitled to register his charge, omitted to do so. *Black v. Williams*, 64 L. J. Ch. 137; [1895] 1 Ch. 408.

CHAPTER V.

THE LAND TRANSFER ACTS.

THE Land Transfer Acts of 1875 and 1897 (38 & 39 Vict. c. 87 and 60 & 61 Vict. c. 65) affect mortgages of land in a registration district in respect of the precautions to be taken before lending money on mortgage, and the remedies of the mortgagee.

Every registered proprietor of any freehold or leasehold land may charge such land with the payment at an appointed time of any principal sum of money, either with or without interest, and with or without a power of sale to be exercised at or after the time appointed. In the absence of an entry on the register there is implied a covenant by the registered owner of the land to pay to the registered owner for the time being of the charge the principal sum charged, and interest, if any thereon, at the appointed time and rate; also a covenant if the principal sum or any part thereof is unpaid at the appointed time, to pay interest half-yearly at the appointed rate on so much of the principal sum as for the time being remains unpaid, also in case of leaseholds to pay, perform and observe the rent, covenants and conditions, and to keep indemnified the proprietor of the charge.

Creation
of charges.

Implied
covenants
to pay
charges.

Implied
covenants
in case of
leaseholds.

Subject to any entry to the contrary on the register, the registered owner of a registered charge has power (1) to enter on the land and into the receipt of the rents and profits thereof, subject to the rights of any persons appearing on the register to be prior incumbrances, and to the liability attached to a mortgagee in possession; (2) to

Rights of
mortgagee
to entry,
foreclo-
sure, and
sale.

enforce a foreclosure or sale; (3) sell or transfer the land in the same way as if he were the registered proprietor of such land. Land Transfer Act, 1875, ss. 22 to 27.

Powers of mortgage under Conveyancing Act incorporated.

The provisions of the Conveyancing and Law of Property Act, 1881, in relation to sale, insurance and receiver are made to apply to registered charges. Land Transfer Act, 1897, s. 9.

The Rules of 1903 provide, r. 107, that every instrument of charge shall be executed as a deed, so that a charge under the Land Transfer Acts incorporates the powers conferred on a mortgage by the Conveyancing and Law of Property Act, 1881.

As to title by possession.

A chargee who enters into possession of mortgaged lands does not acquire a title to the land by possession for twelve years without acknowledgment of the mortgagor's title, but a person who, but for the provisions of the Land Transfer Act, 1874, or this section, would have obtained a title by possession to registered land may apply for an order for rectification of the register. The Land Transfer Act, 1897, s. 12.

The legal estate in the mortgaged land.

The Acts do not confer on a registered chargee the legal estate, the absence of which may place him in great difficulties in the enforcement of covenants against tenants.

Position of a registered chargee.

The result of the above sections appears to be that a registered chargee obtains statutory powers of suing his mortgagor and of enforcing his charge by sale or foreclosure of the mortgaged land as comprehensive as those which the law had previously given to mortgagees. His statutory charge does not give the chargee the legal estate in the mortgaged land, and the Land Transfer Acts prevent him from acquiring any title under the Statutes of Limitations merely from remaining in possession. It is not clear what effect section 12 of the Act of 1897 has upon the

position of a statutory chargee who has been in possession of the mortgaged land for more than twelve years without making any acknowledgment of the mortgagor's title. The section appears to be intended to apply to the case of a squatter on registered land. It is possible that it does not give a mortgagor, though a registered proprietor, an unlimited time for redemption. It does not define the terms upon which, after twelve years, he may redeem. Presumably a mortgagee could not obtain rectification of the register without making the mortgagor a party and making an application to the Court.

The necessity for a careful investigation of the title of the mortgagor does not seem to be removed by the Land Transfer Acts, except possibly in the case of a person who has been originally entered upon the register with an absolute title.

Investigation of title.

If the mortgagor is registered with a possessory title, the registration does not affect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of the title of such first registered proprietor; the borrower must therefore ascertain by an investigation of title dehors the register, the nature and extent of the adverse rights.

Of mortgagor registered with possessory title.

If the borrower has been registered with an absolute title, his title is subject, in addition to the incumbrances, if any, entered on the register, and to the liabilities mentioned in s. 18 of the Act of 1875, where he is not entitled for his own benefit to the land registered as between himself and any person claiming under him to any unregistered estates, rights, interests, or equities to which such persons may be entitled, but subject to the above exceptions, the first registration of any person as proprietor of freehold land with an absolute title vests in that person an estate in fee simple in the land.

Of mortgagor registered with an absolute title.

Trans-
feree.

A transferee of land from a registered proprietor obtains an estate in fee simple in the land transferred subject to the incumbrances entered on the register, but free from all other estates and interests whatsoever. Section 30 of the Act of 1875.

The title
on the
register
may be
varied by
rectifica-
tion.

A further reason for investigation of the title of the mortgagor, is that the title on the register may differ from the real title and be varied by rectification.

The sections of the Land Transfer Acts, which, if taken by themselves would seem to make the register conclusive evidence of a power, in a person registered with an absolute or possessory title or a registered transferee from such a person to create a charge subject only to the estates and interests expressly excepted by the statutes or entered on the register, are controlled by the sections dealing with rectification in case a person not the rightful owner of the land has been registered, and providing an indemnity for innocent persons injured by errors in registration and by rectification.

The Land Transfer Act, 1875, s. 95, gives the Court a power of rectification of the register "subject to any estates or rights acquired by registration in pursuance of this Act." This power of rectification is enlarged by the Land Transfer Act, 1897, s. 7:—

Right to
indemnity
in certain
cases.

(1) Where any error or omission is made in the register or where any entry in the register is made, or procured by, or in pursuance of fraud or mistake, and the error, omission, or entry is not capable of rectification under the principal Act any person suffering loss thereby shall be entitled to be indemnified in manner in this Act provided.

(2) Provided that where a registered disposition would, if unregistered, be absolutely void, or where the effect of such error, omission, or entry would be to deprive a person of land of which he is in possession, or in receipt

of the rents and profits the register shall be rectified, and the person suffering loss by the rectification shall be entitled to the indemnity.

(3) Where the register is rectified under the principal Act by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section.

The result appears to be that when a person is wrongfully placed on the register under a voidable transaction, all *bonâ fide* transfers from that person will, if registered, hold good, and the rightful owners who have been injured by the registration will lose their land and receive compensation ; but that if the transaction is void, or if the effect of the error, supposing it were held good, would be to deprive a person of land of which he was in possession, then the wrongful disposition and all transfers under it are removed from the register, and an innocent person taking under the wrongful disposition is compensated, unless he has caused or substantially contributed to the loss by his act, neglect, or default.

In *Attorney-General v. Odell*, 75 L. J. Ch. 425 ; [1906] 2 Ch. 47, the decision was that a registered transferee by a forged transfer purporting to be made to him by the proprietor of a registered charge was not entitled to an indemnity ; it was also assumed that a transferee from him would be entitled to indemnity, but as an indemnity implies removal from the register under the provisions for rectification, the decision is an authority that all transferees after a void disposition can be removed from the register.

Position of
a mort-
gagee in

It may be urged that an intending chargee need not

case of
removal
from
register.

examine the title of the mortgagor beyond the register. His only interest is his money, and if he is removed from the register, he obtains his money from the indemnity fund. But there is a great difference to a lender between a loan on good security and a loan on bad security with a Government guarantee which can only be made effective, if at all, after an expensive litigation with the Crown.

Rights off
the
register.

In the absence of further decisions on these Acts the position of a chargee or transferee of a charge who advances his money without any further examination of title than an inspection of the register must be doubtful. The registered proprietor may be a trustee for persons entitled to equitable rights which would diminish the fund on which the registered charge is secured. *Gibbs v. Messer*, [1891] A. C. 248; *Assets Co., Ltd. v. Mere Roihi*, [1905] A. C. 176.

Reason
for investi-
gation of
title.

An intending mortgagee should inquire into the mortgagor's title with the same care and elaboration as if the land was unregistered. If the mortgagor has been registered with a possessory title only, the necessity for an examination of title is obvious. If the mortgagor has been registered with an absolute title, there is a risk that he and all transferees from him may be removed from the register by rectification. The claim on the indemnity fund is a more doubtful risk than that which a mortgagee usually cares to run.

Condi-
tions of
sale.

If in the case of registered land, it is unnecessary for a mortgagee to inquire into his mortgagor's title, it must be unnecessary for a purchaser to inquire into the vendor's title. If this be so, the practice of having conditions of sale is superfluous, and it would be sufficient for the vendor to show that he was on the register.

Notice
from the
register.

It is not clear how far there is a duty on a person dealing with registered land or a registered charge to search

the register, so that he may be fixed with notice of all that is recorded in the register, *e.g.*, can a mortgagor safely make a payment to a mortgagee who has assigned his mortgage by transfer registered, of which the mortgagor has no notice? Also, can a mortgagee safely reconvey to a mortgagor, in derogation of the rights of a second mortgagee by registered charge of which he had no notice?

The Acts do not, apparently, make the register conclusive of the statements contained in it. If the register contains an entry of a prior charge and an erroneous notice that the charge has been cancelled, it is assumed that a mortgagee who advanced his money on the faith of the statement that the charge had been cancelled would take subject to it. *Jared v. Clements*, 72 L. J. Ch. 291; [1903] 1 Ch. 428.

Register
not proof
of entries.

There is no express provision in the Acts defining the position of the proprietor of a registered charge with reference to unregistered rights, both legal and equitable, in cases where he can be fixed with notice of them, and in cases where he has no notice. Section 40 of the Act of 1875 does not confer on a transferee of a charge the freedom from other interests which is given by s. 30 of the same Act to a transferee of land.

Notice of
unregis-
tered
rights.

It seems improbable that the Legislature intended to abolish the system of equitable rights dependent upon notice to the legal owner. As by the L. T. R. 80, it is not the duty of the trustees or of the registrar to place on the register restrictions to protect the interests of any person who would not have been a necessary party to a sale or mortgage, if the land had been unregistered, the interests of such persons are unprotected unless they are protected by notice to the registered owner or chargee.

Equitable
rights.

Section 49: "The registered proprietor alone shall be entitled to transfer or charge registered land by a

Sect. 49.

registered disposition ; but subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not, of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered ; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf contained.

“ The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition ; but subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land.”

Convey-
ancing
not altered
by Land
Transfer
Acts.

The purpose of this section is to keep trusts off the register. It is very difficult to understand. In the absence of further decisions on these Acts, it is not possible to say in what way the title off the register may affect the title on the register.

“ There is nothing to suggest that all estates created by unregistered deeds must be equitable. Notwithstanding that the land has become registered land, it may still be dealt with by deeds having the same operation and effect as they would have if the land were unregistered, subject only to the risk of the title being defeated, or, in the language of sect. 49, the ‘ estate ’ being ‘ impaired ’ by the exercise of the statutory powers of disposition given to the registered proprietor, against which

the mortgagee must protect himself by notice on the register. Conveyancing may proceed just as if the Acts of 1875 and 1897 had not been passed. Self-interest and the desire for security will doubtless induce persons, whether purchasers or mortgagees or lessees, to make use of the registers. But the legal operation and effect of common-law assurances will remain untouched by the want of registration." *Capital and Counties Bank, Ltd. v. Rhodes*, 72 L. J. Ch. 336; [1903] 1 Ch. 631, at pp. 656, 657.

A charge under the Land Transfer Acts gives the borrower as much protection as an equitable mortgage by deposit of deeds with a memorandum does, and may be safely used in simple cases and for temporary loans.

Form of mortgage of registered land.

In mortgages which are intended as investments for a lengthened period, the lender should insist on a conveyance of the legal estate.

By transfer on the register.

The mortgagee may take an absolute transfer on the register of the land for a nominal consideration accompanied by a mortgage in the usual form off the register.

In the unregistered mortgage can be included any special stipulation, and a conveyance of any property which may be intended to be included in the mortgage but cannot be entered on the register.

Another method is to take a registered charge in favour of the mortgagee and a mortgage in the ordinary form off the register. In addition to these two documents there may be placed on the register a restriction on the mortgagor's registered title, and there may also be taken a power of attorney from the mortgagor to the mortgagee, enabling the latter to execute a transfer to himself of the mortgaged land.

By statutory charge.

Both these methods are more complicated, and therefore more expensive, than a mortgage of unregistered land.

Latter method alone generally possible.

The method most advantageous to the mortgagee is a transfer on the register with a mortgage off the register; but the Land Registry Office and the Inland Revenue claim that the transfer deed must be stamped as a conveyance on a sale with a ten shillings per cent. stamp on the amount of the mortgage. A mortgagor objects to concur in a method of mortgage which exposes him to the payment of such a stamp. In many cases this claim for stamp duty, whether well-founded or not, makes this method of mortgage impossible.

Advance of part of purchase-money before registration.

Difficulties arise in protecting a mortgagee who advances part of the purchase-money on a sale of land in a registration district.

The routine of the office causes an interval of time between the payment of the purchase-money and the registration of the transfer, and during that interval the mortgagee who has advanced part of the purchase-money has an imperfect security against unauthorized dealings with the mortgaged property by the mortgagor. This difficulty can be removed by fixing completion to take place at the Land Registry, but this course is not always feasible.

Rule 96.

If the mortgagee is content with a statutory charge and the purchaser is a person who has the right to apply for registration as first proprietor of the land, the transaction can be carried out under rule 96 of the Land Transfer Rules, 1903. The vendor transfers in consideration of that part of the purchase-money which is paid to him in cash by the purchaser and in consideration of a charge for the residue, and by the same deed the purchaser creates the charge.

Two precedents are given in *Brickdale and Sheldon*, 2nd ed. pp. 587-588, according as the mortgagee is the original vendor or a third person.

When land situated in a registration district but not on the register is sold and part of the purchase-money is advanced on mortgage, if the mortgagee is a third party the transaction can be carried out by a mortgage from the vendor to the mortgagee with an agreement in the mortgage exempting the vendor from all personal liability and a covenant by the mortgagor for payment of principal and interest. By a subsequent deed the vendor conveys the equity of redemption to the purchaser. The mortgagee can at any time procure himself to be registered as owner of a charge.

Mortgage
before
registra-
tion.

If the form of security adopted is a statutory charge and a mortgage off the register, as the registration of the transfer to the purchaser would impair a mortgage deed executed by him prior to registration and unregistered the mortgage deed must be executed by the purchaser after he has been registered as proprietor or there must be a power of attorney to the mortgagee to execute it in the name of the mortgagor after the transfer. For the conveyancing difficulties in respect of mortgages of registered land, see Williams' Vendor and Purchaser, vol. ii., pp. 1125-1139, and Key and Elphinstone, vol. ii., pp. 925-930, 8th ed.

Part of
purchase
money
secured
by statu-
tory
charge.

It is the invariable custom for the deeds to be delivered on a legal mortgage of land and on a mortgage of stocks and shares for the certificate to be delivered, therefore in the absence of some special circumstance the mortgagee should stipulate for the custody of the title deeds and land certificate.

Custody
of land
certifi-
cate.

CHAPTER VI.

ASSIGNMENTS.

SETTLEMENT OF EQUITY OF REDEMPTION.

Order of
redemption.

BETWEEN persons interested under a settlement of a mortgaged property, the order of their interest gives the order in which they have the option to redeem or to continue payment of interest.

The wife's heir cannot, during the husband's estate by curtesy, redeem the property against the husband's will. *Ravald v. Russell*, (1830) Younge, 9; *Raffety v. King*, (1836) 1 Keen, 601.

The following rules were laid down by Chief Baron Alexander in *Ravald v. Russell*, *supra*, and cited with approval in *Raffety v. King*, *supra*; *Wicks v. Scrivens*, (1860) 1 J. & H. 215.

- I. The tenant for life is bound to keep down the interest (that is, out of the income).
- II. The owner of the fee must give the tenant for life the option of redeeming.
- III. Whether the action be brought by the mortgagee to foreclose, or by the owner of the fee to redeem, the tenant for life must always have the first option to redeem, and he cannot be forcibly redeemed by a subsequent remainderman.

The same principle applies to a person entitled for any limited estate, as during the minority of others; while his estate lasts, the mortgage on the property cannot be

redeemed without his consent. *Prout v. Cöck*, 66 L. J. Ch. 24; [1896] 2 Ch. 808.

The remainderman can obtain a receiver of the estate against a tenant for life who neglects to pay the interest out of the income. *Kensington v. Bouverie*, (1859) 29 L. J. Ch. 537.

Tenant for life neglecting to pay interest.

Payment of interest in excess of income without communication to the remainderman of the fact, and of the liability of the estate, raises a presumption on the part of the tenant for life of an intention to exonerate the mortgaged property. *Kensington v. Bouverie*, *supra*. As to payment off of capital, see p. 135.

Exoneration of property.

Receipt by a mortgagee in possession of rents and profits to an extent greater than the interest, gives the tenant for life a charge on the mortgaged property for the excess. *Pawley v. Colyer*, (1867) 3 D. J. & S. 695.

Charge on *corpus* for rents in excess of interest.

A tenant for life redeeming holds the property subject to the rights of the other persons interested under the settlement. If he is plaintiff in a redemption action, he is entitled to add his own costs of suit subsequent to the hearing, and the costs which he has paid to the mortgagees, to the principal and interest of his debt as against the estate. *Pearce v. Morris*, (1869) 39 L. J. Ch. 342; 5 Ch. 227; *Wicks v. Scrivens*, (1860) 1 J. & H. 215.

Tenant for life redeeming.

A tenant for life with an absolute power of appointment is bound to keep down the interest on charges created by himself. *Whitbread v. Smith*, (1854) 3 D. M. & G. 741.

The obligation of a tenant for life to keep down the interest exists only as between him and the remainderman, and not as between him and the incumbrancer. *Morley v. Saunders*, (1869) 8 Eq. 594.

As between himself and the remainderman a tenant for life, who receives two properties included in the same gift of which one property is mortgaged to such an

Onerous and beneficial property in

aggregate
gift.

amount that the interest on the mortgage exceeds the yearly income of the mortgaged property, cannot abandon to the mortgagee the onerous property; The income of the total of the properties must be applied in keeping down the interest of the mortgage of any one of the properties. *Guthrie v. Walrond*, (1888) 52 L. J. Ch. 165; 22 C. D. 578; *Syer v. Gladstone*, (1885) 30 C. D. 614; *Frewen v. Law Life Assurance Society*, 65 L. J. Ch. 787; [1896] 2 Ch. 511.

The connection together of the two properties so as to form part of one gift does not at all depend upon the question whether they are given in one sentence or in two sentences. *In re Hotchkiss, Freke v. Calmady*, (1886) 55 L. J. Ch. 546; 32 C. D. 408.

Arrears of
interest
payable
out of sub-
sequent
rents.

A tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during his life are applicable to liquidate arrears accruing during the same life tenancy, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of a part of the property. *Honeywood v. Honeywood*, 71 L. J. Ch. 174; [1902] 1 Ch. 347.

Since Locke King's Acts if unencumbered and encumbered lands are comprised in one gift the devisees cannot, in a contest between themselves and the personal estate, claim to have the deficiency on one property paid by the personal estate. *In re Kensington, Longford v. Kensington*, 71 L. J. Ch. 170; [1902] 1 Ch. 203.

Where
there is a
prior life
estate not
liable for
interest.

As a result of the rule that a tenant for life is not bound to do more than employ the income in keeping down the interest accruing during his life, it follows that in the case of successive life tenants arrears accrued

during a prior life tenancy are borne not by subsequent life tenants but by the inheritance. This rule is subject to an exception, namely, where a prior life estate is not liable to pay the interest, as for example where part of the mortgaged property was in the possession of a tenant for life and part remained in the possession of a jointress under the limitations in a prior settlement. During the lifetime of the jointress who was not bound to pay any part of the interest, the rents of the part in possession were insufficient to pay the interest. It was held that the tenant for life was liable to make good the arrears out of the additional rents received by him after the death of the jointress. *Tracy v. Hereford*, (1786) 2 Bro. C. C. 128; *Caulfield v. Maguire*, (1845) 2 J. & Lat. 141.

After the death of a mortgagor the interest due on the mortgage and the premiums of the policy, which was the security for the mortgage, were paid out of the income of the mortgagor's estate until the death of the assured. It was held that as between the tenant for life and the remaindermen the amount of income expended in keeping down the premiums and interest ought to be recouped to the tenant for life, with interest at 4 per cent. out of the property preserved by the expenditure—that is, the surplus policy moneys. *In re Morley*, *Morley v. Haig*, 64 L. J. Ch. 727; [1895] 2 Ch. 738.

Liability
for pre-
miums
and
interest.

The purchaser of an equity of redemption is under an implied obligation to indemnify the mortgagor against the personal obligation to pay the mortgage debt, for being owner of the mortgaged property he must be supposed to intend to indemnify the vendor against the mortgage, but in the absence of special circumstances it cannot be inferred that an assignee of an equity of redemption undertakes a personal liability towards the mortgagee. Payment of interest by an assignee is made

Liability
of pur-
chaser of
equity of
redemp-
tion.

in order to preserve the mortgaged property, and is no evidence of an intention to take the debt upon himself personally. *Waring v. Ward*, (1802) 7 Ves. 332; *In re Errington, Ex parte Mason*, [1894] 1 Q. B. 11.

Danger of taking transfer of mortgage without priority of mortgagor.

A purchase of a mortgage debt cannot be safely made without communication with the mortgagor, for where a mortgage is transferred without the privity of the mortgagor the mortgagee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer. *Turner v. Smith*, 70 L. J. Ch. 144; [1901] 1 Ch. 213: *see infra*, p. 146.

Release of equity of redemption.

On a release by a mortgagor to the mortgagee of the equity of redemption, even if for no consideration except a release of the mortgage debt, the mortgagor and mortgagee must be regarded, until the contrary is shown, as on the ordinary footing of vendor and purchaser. Mere undervalue is not a sufficient ground for setting the transaction aside. *Ford v. Olden*, (1867) 36 L. J. Ch. 651; 8 Eq. 461; *Knight v. Marjoribanks*, (1849) 2 Mac. & G. 10; *Melbourne v. Brougham*, (1882) 51 L. J. P. C. 65; 7 A. C. 307.

An agreement to give up possession and to execute a release, when required, of the equity of redemption, does not constitute a release when no request has been made for twelve years. *Rushbrook v. Lawrence*, (1869) 5 Ch. 3.

Mortgage from defaulting trustee.

A mortgagee, who takes from an executor or trustee a mortgage of shares, original or derivative, in the trust property, is subject to all equities, and consequently can take nothing from the estate until the default of his assignor has been made good, even where the default has been committed after the assignment. *Cole v. Muddle*, (1852) 10 H. 186; *Doering v. Doering*, (1889) 42 C. D. 203.

Devolution on death.

A mortgage debt, being personalty, belongs, on the death of a mortgagee intestate, to his next of kin.

If a mortgagee of real estate has entered into possession and the mortgagor has become barred of his equity of redemption before the death of the mortgagee, then on his death intestate the debt is merged in the land and belongs to the heir-at-law, but if a mortgagee of real estate, who has entered into possession, dies intestate before the equity of redemption is barred, the beneficial interests of his next of kin are personalty at the time of his death but become realty from the time when the equity of redemption was barred, and on their death intestate after that time belong to their heirs-at-law.

“Where a person dies entitled to a mortgage interest, that is personal estate at that time ; and though afterwards the mortgagor may be barred, that would not convert the property as between the representatives at the time of his death from personal to real ; but the person taking it as real would be a trustee for the persons entitled to it at the death of the testator, such as it was.” *Per* Lord Eldon, *Attorney-General v. Vigor*, (1803) 8 Ves. 256 ; *In re Loveridge, Drayton v. Loveridge*, 71 L. J. Ch. 865 ; [1902] 2 Ch. 859 ; *In re Loveridge, Pearce v. Marsh*, 73 L. J. Ch. 15 ; [1904] 1 Ch. 518.

Where an estate or interest of inheritance, or limited to the heir as special occupant in any tenements or hereditaments, corporeal or incorporeal, is vested by way of mortgage in any person solely, the estate or interest, on his death, notwithstanding any testamentary disposition, devolves to and becomes vested in his personal representatives or representative from time to time in like manner as if the same were a chattel real vesting in them or him. The Conveyancing Act, 1881, s. 90.

Devolution of mortgaged estates.

The Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45, provides that the thirtieth section of the Conveyancing and Law of Property Act, 1881, shall not apply to land of

copyhold or customary tenure vested in the tenant on the court rolls of any manor upon any trust or by way of mortgage. *In re Mills' Trusts*, (1880) 40 C. D. 14.

Escheat. In the case of a mortgage of realty on the death of a mortgagor without an heir and intestate, the equity of redemption did not formerly escheat. The mortgagee acquired the equity of redemption subject to the mortgagor's debts. *Burgess and Wheate*, (1759) 1 Eden, 176; *Beale v. Symonds*, (1853) 16 B. 406; *Gallard v. Hawkins*, (1884) 53 L. J. Ch. 884; 27 C. D. 298.

From and after the 14th August, 1884, where a person dies without an heir, and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments. *Intestates' Estates Act*, 1884, 47 & 48 Vict. c. 71, s. 4.

If this section applies to such an interest as an equity of redemption, the equity of redemption escheats on the death of a mortgagor without an heir, and intestate.

**Liability
of lord
taking
escheat.**

The lord taking the equity of redemption holds it as assets for the payment of the mortgagor's debts, under 3 & 4 Will. 4, c. 104; and can redeem the mortgage. *Downe v. Morris*, (1844) 3 H. 394; *Bowles v. Hyatt*, (1868) 57 L. J. Ch. 777; 38 C. D. 609.

**No escheat
of freehold
vested in
mort-
gagee.**

There is no escheat of freehold property vested in the mortgagee by way of mortgage (the *Trustee Act*, 1850, s. 46) now by the *Conveyancing Act*, 1881, s. 30, *supra*, the legal estate vested in a mortgagee devolves to his personal representatives.

**Vesting
order in**

Trustee Act, 1893 (56 & 57 Vict. c. 53) s. 29:—

"Where a mortgagee of land has died without having entered into possession and the money due has been paid to a person entitled to receive the same, or that person consents, the Court may make a vesting order of the land.

place of conveyance by heir or devisee or personal representative of mortgagee.

"(a) Where an heir or personal representative of the mortgagee is out of the jurisdiction or cannot be found.

"(b) Where an heir or personal representative or devisee of the mortgagee has stated in writing that he will not convey or has omitted to do so for 28 days after tender of reconveyance.

"(c) Where it is uncertain which of several devisees was the survivor.

"(d) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living.

"(e) Where there is no heir or personal representative of a mortgagee intestate as to the land, or where it is uncertain who is his heir or personal representative or devisee."

Sub-sect. (e) applies where the mortgagee has left a will, the validity of which is disputed. *Cook's Mortgage*, [1895] 1 Ch. 700.

SUB-MORTGAGE.

In a sub-mortgage, the mortgagee transfers the mortgaged property and the original mortgagor's covenant for payment to the new mortgagee as security for a loan to himself.

Sub-mortgage.

It is no longer necessary that a sub-mortgage should contain an express power of attorney to sue for the original debt, and to give valid receipts in the name of the sub-mortgagor. The sub-mortgagee can sue the original

Express power to sue.

mortgagor at law and in his own name. The action is brought under the provisions of the Judicature Act, 1873, s. 25, sub-s. 6, which provides that "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor . . . shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice . . ." The notice to the debtor mentioned in this sub-section must be given before action brought, but there is no other limit of the time within which notice must be given. *Bateman v. Hunt*, 73 L. J. K. B. 782; [1904] 2 K. B. 530.

An assignment with a proviso for redemption is an absolute assignment within sect. 25, sub-sect. 6, of the Judicature Act, 1873. *Tancred v. Delagoa Bay Company*, (1889) 58 L. J. Q. B. 459; 23 Q. B. D. 239; *Comfort v. Betts*, 60 L. J. Q. B. 656; [1891] 1 Q. B. 737.

Assign-
ment by
way of
security,
but pur-
porting
to be
absolute.

An assignment which purports to be absolute or which is intended to pass to the assignee complete control of all moneys payable under the original covenant is within the sub-section although it was made by way of security. *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765; *Hughes v. Pump House Hotel Company*, 71 L. J. K. B. 630; [1902] 2 K. B. 190.

Sub-mort-
gagee in
possession.

A sub-mortgagee who enters into possession of the original debt must use due diligence in obtaining payment, for he will be charged with that which he might have received but for his wilful default. Entry into possession means exclusion of the sub-mortgagor, and

assumption by the sub-mortgagee of the control of the proceedings to enforce payment of the original debt. *Ex parte Mure*, (1788) 2 Cox, 63; *Williams v. Price*, (1824) 1 S. & S. 581.

The concurrence of the original mortgagor, or information from him as to the state of accounts between him and his mortgagee, should be obtained, because the sub-mortgagee, as assignee of the debt, is bound to give credit for all moneys received by his assignor from the debtor before notice of the assignment. *Mathews v. Wallwyn*, (1798) 4 Ves. 118; *Jones v. Gibbons*, (1804) 9 Ves. 410; *Allen v. Southampton*, (1880) 16 C. D. 178.

Sub-mortgagee bound by equities of his assignor.

The sub-mortgagee as transferee of the mortgage debt is bound by the accounts between the mortgagor and mortgagee at the date of the assignment to himself, and is entitled to rely on the statements in the mortgage deed, *e.g.*, that 250*l.* was advanced, while in fact only 90*l.* was advanced; and where the mortgage money is paid by the mortgagor to an agent of the sub-mortgagor, he is entitled to dispute the authority of the agent, and to show that the mortgage is still unsatisfied. *Bickerton v. Walker*, (1885) 55 L. J. Ch. 227; 31 C. D. 151; *Withington v. Tate*, (1869) 4 Ch. 288; *Bateman v. Hunt*, *supra*.

Recitals in original mortgage.

The sub-mortgagee cannot prevent the sub-mortgagor from realizing the debt due to him from the mortgagor and at the same time hold him liable for his own debt. If the sub-mortgagee decides to prevent the sub-mortgagor proceeding with the action, he must re-convey to him his own estate and release him from personal liability; on the other hand, the sub-mortgagee is entitled to prevent the money recovered from the mortgagor getting into the hands of the sub-mortgagor. This equity is said to result because the sub-mortgagor is, in a certain sense,

Sub-mortgagor in position of surety.

surety for the mortgagor in that he and his estate are liable to pay to the sub-mortgagee what cannot be recovered from the mortgagor. *Gurney v. Seppings*, (1846) 2 Ph. 40.

Powers in
original
mortgage.

There is very little authority as to the effect of a sub-mortgage on the powers contained in the original mortgage. When a mortgage with a power of sale was transferred by way of mortgage in terms which impliedly transferred also the power of sale, and afterwards the mortgagee sold under the power of sale to the sub-mortgagee, *Kindersley, V.-C.*, considered the title too doubtful to force on a purchaser. *Cruse v. Nowell*, (1856) 25 L. J. Ch. 709.

Possibly the sub-mortgagee may sell under the power in the original mortgage, if his mortgage deed gives him an express power of attorney for that purpose.

A mortgagee cannot exercise the power of sale to the prejudice of his sub-mortgagee. *Simpson v. Bathurst*, (1869) 5 Ch. 193; *Alexander v. Mills*, (1870) 40 L. J. Ch. 73; 6 Ch. 124.

See as to the parties in a foreclosure or redemption action of a sub-mortgage, p. 260.

Ordinarily a sub-mortgage is for a less sum than what is due on the original mortgage, and in order to recover his property the mortgagor pays to the sub-mortgagee what is due to him from the sub-mortgagor and the surplus to the sub-mortgagor.

Redemp-
tion for
sum due
on original
mortgage.

When a sub-mortgagee resists redemption by the mortgagor, except upon payment of all that is due to him exceeding what is due on the original mortgage, he must show some special circumstances, such as estoppel, or that the property is of such a kind that it passes by delivery to a *bonâ fide* holder for value. *Sheffield v. London Joint Stock Bank*, (1888) 57 L. J. Ch. 986; 13 A. C. 333; *The London Joint Stock Bank v. Simmons*, 62 L. J. Ch. 358; [1892] A. C. 201.

CHAPTER VII.

MERGER.

THERE shall not, after the 1st of November, 1875, be any merger. merger, by operation of law only, of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. Judicature Act, 1873, s. 25, sub-s. 4.

At law, merger is described to be whenever a greater At law. estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately annihilated, or is said to be merged; that is, sunk or drowned in the greater. Thus, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else if the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger. 2 Bl. Com. 177; Sheppard's Touchstone, 347, n.; Challis on Real Property, ch. 10.

Mergers are odious in equity, and never allowed, unless In equity. for special reasons. 1 P. Wms. 41; Wms. Exors. 6th ed. 608.

When a charge upon an estate comes into the hands of the owner of the estate on which it is a burden, the presumption is that the charge is merged in the estate. Thus, if an owner of an equity of redemption purchases the

mortgage on the estate, the mortgage would naturally merge. *Swinfen v. Swinfen*, (1860) 29 B. 199.

In more complicated cases, as where there are second or third mortgages, which, if the first mortgage were extinguished, would become first and second mortgages, or where a person purchases with money absolutely his own a mortgage on an estate in which he has only a limited interest, in all these cases the merger of the mortgage is not a mere matter of form, but may seriously affect the rights of the parties.

Union of
charge
and estate.

In the absence of a union of charge and inheritance in the same person and in the same right, there could be no merger, apparently, at law, according to the above extract from Sheppard's Touchstone—certainly not in equity. *Chambers v. Kingham*, (1878) 10 C. D. 743; *Thorn v. Newman*, (1673) 3 Sw. 608. When an owner of an equity of redemption becomes entitled, subject to a prior life estate, to the sum secured by mortgage, there can be no merger during the existence of the life estate. *Tyrwhitt v. Tyrwhitt*, (1863) 32 Beav. 244; *Wilkes v. Collin*, (1869) 8 Eq. 338.

There is no merger of the life interest if a tenant for life of personalty takes the reversionary interest as administrator of the person entitled. *Radcliffe v. Bewes*, 61 L. J. Ch. 186; [1892] 1 Ch. 227.

Question
of inten-
tion.

The question whether the mortgage is extinguished or kept alive is entirely one of intention, which may be inferred not only from contemporaneous expressions, but from the surrounding circumstances. When a borrower, owner in fee simple or tail, pays off an incumbrance, the presumption is extremely strong that he intended the mortgage to be merged in the inheritance. No such presumption arises where the incumbrance is paid off by a limited owner. *Adams v. Angell*, (1877) 5 C. D. 634.

A conveyance by the first mortgagee to the trustee in bankruptcy of the mortgagor does not merge the first mortgage, so that the second mortgage becomes first; but the trustee holds the first mortgage in trust for all the creditors. The right of the second mortgagee to redeem is unaffected. *Cracknall v. Janson*, (1877) 6 C. D. 735; *Bell v. Sunderland Building Society*, (1888) 53 L. J. Ch. 509; 24 C. D. 618.

On conveyance to trustee in bankruptcy of mortgagor.

A purchaser of an equity of redemption cannot set up a prior mortgage of his own, nor, consequently, a mortgage which he has got in, against subsequent incumbrances of which he had notice. *Toulmin v. Steere*, (1817) 3 Mer. 210.

Toulmin v. Steere.

This doctrine seems reasonable when applied to a payment off of a first mortgage by a mortgagor who was the borrower, but it is difficult to understand why the purchase by a prior mortgagee of an equity of redemption, or the purchase of a prior mortgage by an owner of an equity of redemption not the original borrower, should make second and third mortgages become first and second respectively at the expense of the prior mortgagee.

The case of *Toulmin v. Steere* has rarely been mentioned without disapprobation, especially in *Adams v. Angell*; see also *Watts v. Symes*, (1851) 1 D. M. & G. 244; *Parry v. Wright*, (1828) 1 S. & S. 369; *Squire v. Ford*, (1851) 9 H. 60; *Ottor v. Lord Vaux*, (1856) 6 D. M. & G. 638; 2 K. & J. 650; *Anderson v. Pignet*, (1872) 42 L. J. Ch. 310; 8 Ch. 180.

In the absence of contemporaneous expression of intention by the payer, the mortgage which is paid off is merged in favour of other incumbrancers; that is in the case of a purchaser from the owner of an equity of redemption, in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether

Presumption of intention.

actual or constructive, of other incumbrances is not, in the absence of any contemporaneous expression of intention, entitled as against other incumbrancers of whose securities he has notice, to say that the incumbrances so paid off are not extinguished. *Adams v. Angell*, (1877) 5 C. D. 645; *Thorne v. Cann*, 64 L. J. Ch. 1; [1895] A. C. 11.

It would seem that the presumption is now rather the other way: "Having regard to this decision, *Thorne v. Cann*, it is perhaps now safe to go a little further, and to say that, where a purchaser of a property pays off a charge on it without showing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting, unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence." *Per* Lindley, L.J., *Liquidation Estates Purchase Company v. Willoughby*, 65 L. J. Ch. 486; [1896] 1 Ch. 726, and S. C. 67 L. J. Ch. 251; [1898] A. C. 321.

When
security
for debt
still sub-
sisting at
law.

There is no merger in equity, if the security for the debt is still subsisting at law, as on the purchase of the fee by the *cestui que trust* of a mortgage debt, secured by a term of years vested in a trustee for him. *Anderson v. Pignet*, *supra*.

Involun-
tary
union.

The effect of an involuntary union of charge and mortgaged estate, as when the owner of a first mortgage takes as heir the equity of redemption, seems not to be concluded by any authority.

An intention to merge his debt may be inferred by a contract between the mortgagor and a mortgagee, buying the equity of redemption, that the mortgagee should pay other debts. *Brown v. Stead*, (1832) 5 S. 535; *Kinnaird v. Trollope*, (1888) 57 L. J. Ch. 905; 39 C. D. 636.

A limited owner cannot, by payment of a debt, benefit himself at the expense of the other beneficiaries in a manner contrary to the spirit of the settlement; but he may, if he wishes, surrender his rights as creditor of the settled estate and extinguish the debt, so that every interest under the settlement is relieved from the burden of the debt.

Limited owner.

When a limited owner pays off a charge, the presumption is that he did not intend the charge to merge, but to be kept alive for his own benefit.

Presumption not to exonerate.

This presumption may be conclusively established by other circumstances, as by an express declaration at the time when the charge is paid, or taking an assignment of the debt for his own benefit. *Adams v. Angell, supra.*

The omission to take such precautions may be slight evidence of an intention to allow the debt to merge, but by itself is not sufficient; for the Court will, in the absence of further evidence, presume that such omission was a mere oversight, and will give him, or compel the proper parties to give him, an assignment or instrument which shall place him in the same position as if he had obtained it for himself. *Burrell v. Earl of Egremont*, (1844) 7 B. 205; *Morley v. Morley*, (1855) 5 D. M. & G. 610; *In re Harvey*, *Harvey v. Hobday*, 65 L. J. Ch. 370; [1896] 1 Ch. 137; *Gifford v. Fitzhardinge*, 68 L. J. Ch. 529; [1899] 2 Ch. 32.

Omission to demonstrate intention.

The presumption against an intention to allow the debt to merge may be rebutted by circumstances showing a contrary intention. A tenant for life, paying interest on moneys borrowed to pay off the charge much beyond what the profits of the estate would have discharged, was held to have shown an intention to discharge the inheritance. *Jones v. Morgan*, (1783) 1 Bro. C. C. 206; *Earl of Buckingham v. Hobart*, (1818) 3 Sw. 186; *Jameson v. Stein*,

Presumption may be rebutted.

(1855) 21 B. 5; *Faulkner v. Daniel*, (1843) 3 H. 199; *Dolphin v. Aylward*, (1870) 4 H. L. 486.

Tenant
in tail.

Similar to limited owners are tenants in tail without power to bar the entail (*Shrewsbury v. Shrewsbury*, (1790)

Tenant in
fee simple
with exe-
cutory de-
vise over.

1 Ves. 227); and tenants in fee simple subject to an executory devise over. *Drinkwater v. Coombe*, (1825) 2 S. & S. 940; *Shackell v. Colnett*, 61 L. J. Ch. 9; [1891] 2 Ch. 135.

Purchase
cannot be
used to
detriment
of charges
created by
purchaser.

A limited owner cannot purchase incumbrances on the inheritance and use them for his own benefit against charges on his own interest created by himself; but if he takes an assignment of them to a trustee, who afterwards assigns them to a mortgagee without notice of the subsequent charges, the mortgagee may use them against the charges on the limited interest. *Harman v. Foster*, (1838) 1 Dr. & W. 637.

By owner
in fee.

An owner in fee simple, who buys up incumbrances created by himself, cannot assign them to a trustee and use them for his own benefit against subsequent incumbrances. If the owner, however, takes an assignment to a trustee, who afterwards assigns to a mortgagee without notice of the subsequent incumbrances, the mortgagee could use them, it is submitted, (a) if the owner had not paid for them out of his own money; (b) in the absence of evidence that the mortgagee knew that the trustee was a trustee for the owner. *Mackenzie v. Gordon*, (1839) 6 Cl. & F. 892.

Against
charges
not
created by
purchaser.

The owner in fee simple may purchase the first of two incumbrances on the inheritance not created by himself and use it against the second incumbrance for its full value, though he may have bought it for a less sum. *Davis v. Barrett*, (1851) 14 B. 542.

No pre-
sumption
of exone-
ration.

Payment off of a charge by a person whose title is under dispute raises no presumption of an intention to merge

the charge for the benefit of the inheritance. *Shackell v. Colnett, supra.*

A second mortgagee may buy up an incumbrance prior to himself and charge mortgagor and incumbrancers subsequent to himself with the full amount due on the purchased mortgage, though he may have paid less than that amount for it. *Dobson v. Land*, (1850) 8 H. 216.

Purchase
by second
mort-
gagee.

A mortgagor who pays off an incumbrance created by himself cannot set it up against a subsequent incumbrancer. *Otter v. Lord Vaux*, (1856) 2 K. & J. 587; *In re Tasker*, *Hoare v. Tasker*, 74 L. J. Ch. 643; [1905] 2 Ch. 587.

There are two exceptions to the rule that a purchaser of an incumbrance, not created by himself, may use it if assigned to a trustee for the full amount due on it.

I. A purchased incumbrance cannot be used by the purchaser against incumbrances created by himself. *Harman v. Foster*; *Davis v. Barrett, supra.*

II. An incumbrance when purchased by a person in a fiduciary position is only security for the sum actually paid. *Baskett v. Cafe*, (1851) 4 De G. & S. 388; *Morret v. Paske*, (1740) 2 Atk. 54; *Butcher v. Churchill*, (1808) 14 Ves. 567. As, for example, when purchased by solicitor to the mortgagor, *Nelson v. Booth*, (1857) 3 Jur. N. S. 951; *Hobday v. Peters*, (1860) 28 B. 349; *Carter v. Palmer*, (1841) 8 Cl. & F. 657; *Macleod v. Jones*, (1883) 53 L. J. Ch. 534; 24 C. D. 289; by surety as against principal debtor, *Reed v. Morris*, (1837) 2 My. & Cr. 361; by guardian, *Powell v. Glover*, (1721) 3 P. Wms. 251.

An heir-at-law, buying in incumbrances, purchases

Purchase
by heir.

them for the benefit of the estate, and therefore is not entitled to more than the sums which he actually paid. *Lancaster v. Evors*, (1846) 16 L. J. Ch. 8; 10 B. 154; 1 Ph. 349.

"The rule was laid down generally indeed by Lord Chancellor Jeffreys in the case of *Williams v. Springfield*, 1 Vern. 476, as well with regard to creditor and creditor, as to trustees, heir-at-law or executor, but I cannot say that I remember any decree in this Court subsequent to this case, where it has been laid down as a general rule, but it has been much more narrowed since and holds only with regard to agent, trustee, heir-at-law, or executor." Lord Hardwicke in *Morret v. Paske*, *supra*.

The heir can use the incumbrance to its full extent—

- (a) If given to him by the bounty of another (*Anon.*, (1707) 1 Salk. 155);
- (b) against an incumbrancer who has a charge on the estate of the ancestor, but is not, strictly speaking, a creditor (*Davis v. Barrett*, (1851) 14 B. 542);
- (c) to protect an incumbrance of his own (*Davis v. Barrett*).

When
official
receiver
entitled to
redeem at
a sum less
than
nominal
amount of
mortgage.

Where the estate of the mortgagor was being administered in bankruptcy, the first mortgagee valued his security at a sum less than the debt, and then commenced an action of foreclosure against the official receiver and the subsequent incumbrancers. It was held, on motion for judgment in default of pleading, that the judgment ought to contain a declaration that the official receiver was entitled to redeem at a sum less than that at which the subsequent incumbrancers were entitled to redeem. *Knowles v. Dibbs*, W. N. (1899) 53.

Subroga-
tion.

Payment of part or whole of a mortgage debt by a person not liable may show an intention that the sum so

paid off is not discharged, but kept alive for the benefit of the payer, who is entitled to stand in the shoes of the mortgagee to the extent of the advance paid off, but not in competition with the mortgagee. If strangers, at the request of trustees of an incumbered estate, pay the mortgagee 600*l.* out of a mortgage debt of 1,000*l.*, on realization the mortgagee takes 400*l.* and the payers have all his rights so far as 600*l.*, the residue of the debt. *Patten v. Bond*, (1889) 60 L. T. 583; *Chetwynd v. Allen*, 60 L. J. Ch. 160; [1899] 1 Ch. 353.

CHAPTER VIII.

ACCOUNTS.

Accounts before mortgagee is in possession.

WHEN a mortgagee has not been in possession, and the general indebtedness has been reduced only by payments made by the mortgagor to the mortgagee, the appropriation of payments by mortgagor is as follows :—

Right of appropriation.

I. The debtor has first right to appropriate.

II. On his failing, then the creditor has a right to do so, and that not only at the instant of payment, but up to the last moment. *Simson v. Ingham*, (1823) 2 B. & C. 65 ; *Mills v. Fowkes*, (1839) 5 Bing. N. C. 455 ; *City Discount Co. v. McLean*, (1874) L. R. 9 C. P. 692.

III. If no intention of debtor or creditor can be discovered from the course of business, the form of the accounts and the receipts, or the stipulations between the parties, the law will assume that the payments were appropriated—

(a) As between capital and income, to income first and then to capital.

(b) As between several debts, to the earlier in point of date. *Mackenzie v. Gordon*, (1839) 6 Cl. & F. 892.

The written accounts not conclusive.

The written accounts and receipts, though strong evidence, are not conclusive, and can be rebutted by other evidence. *Henniker v. Wigg*, (1843) 4 Q. B. 792 ; *Kershaw v. Kirkpatrick*, (1878) 3 A. C. 345.

Clayton's case.

A creditor, who has kept a running account of payments

and debts, will, in the absence of evidence to the contrary, be assumed to have, as far as he lawfully could, appropriated the payments to the debts in order of date. *Clayton's Case*, (1816) 1 Mer. 572; *London and County Banking Co. v. Terry*, (1884) 25 C. D. 692.

A mortgagee in possession who sells a portion of the mortgaged property, so diminishing the source from whence the interest is to be paid, and receives purchase-money more than sufficient to pay all interest and costs, ought to apply the surplus of the purchase-money, after payment of interest and costs, in reduction of the principal, and in the future charge interest on the diminished principal. *Thompson v. Hudson*, (1866) 10 Eq. 497; *Wilding v. Saunderson*, 66 L. J. Ch. 684; [1897] 2 Ch. 534.

Receipt of portions of corpus.

Receipt of rents by a mortgagee in possession is not payment of interest by the mortgagor so as to entitle him to the benefit of a proviso for reduction of interest on punctual payment. In the case of a proviso which in the event of the default of the mortgagor gives the mortgagee something to which he would not otherwise be entitled under the deed; the mortgagee cannot say that interest is in arrear if he has in his hands rents equal to or in excess of the interest, and even if the rents in hand are less than the interest it is doubtful if he could claim as interest in arrear a greater sum than the amount by which the rents in hand are less than the interest payable. *Union Bank of London v. Ingram*, (1880) 50 L. J. Ch. 74; 16 C. D. 53; *Cockburn v. Edwards*, (1881) 51 L. J. Ch. 46; 18 C. D. 449; *Bright v. Campbell*, (1889) 41 C. D. 388; *Wrigley v. Gill*, 75 L. J. Ch. 210; [1906] 1 Ch. 165.

Payment by receipt of rents.

A mortgagee entering into possession of the mortgaged property is chargeable not only with the rents and profits which he has actually received, but also with all sums

Mortgagee in possession.

which he might have received but for his own wilful default. *Parkinson v. Hanbury*, (1867) 2 H. L. 1; *Kensington v. Bouverie*, (1859) 7 D. M. & G. 134; *Noyes v. Pollock*, (1885) 55 L. J. Ch. 515; 32 C. D. 53.

The question whether the actual receipts are less than they would have been if due diligence had been used, is a question of fact dependent on the circumstances of each case.

It is here assumed that the mortgagee is in possession, and that the items on the receipt side of the account include everything which ought to have been received.

Method of
taking
accounts.

The general rule in taking accounts between mortgagor and mortgagee in possession, is to put on one side of the account the principal sum and the interest, and on the other all the sums received, whether they are the annual fruits of the property or the *corpus*. The mortgagee does not pay interest on the excess of the receipts for those periods during which his receipts are in excess of the interest due, and he cannot charge interest on any arrears of interest. *Union Bank of London v. Ingram; Cockburn v. Edwards*, *supra*.

Rests.

The account is taken with rests and compound interest charged against the mortgagee under two circumstances:—

Possession
after pay-
ment.

I. Possession retained by the mortgagee after receipt of more than all his principal, interest, and costs: on the ground that mortgagees who remain in receipt of the rents after their debt has been fully paid, avail themselves of another man's money for their own use and benefit, and ought to be charged with interest. *Wilson v. Metcalfe*, (1826) 1 Russ. 530; *Ashworth v. Lord*, (1877) 57 L. J. Ch. 230; 36 C. D. 545.

Entry
when no
arrears.

II. Entry into possession at a time when there were no arrears of interest.

The principle is, that a mortgagee is not bound to receive payment of his debt by driblets, but he has the right to do so, if he thinks fit; if he enters into possession, when no arrear of interest is due, he evidences his intention so to receive payment of the debt, and the account therefore goes with rests. But if the interest is in arrear when he enters into possession, the fact of his taking possession affords no evidence of his intention to receive payment by driblets, as he is driven to take possession by the non-payment of the interest. *Nelson v. Booth*, (1857) 3 De G. & J. 119; *Scholefield v. Ingham*, (1838) C. P. Cooper, 477; *Horlock v. Smith*, (1844) 1 Collyer, 287; *Thornycroft v. Crockett*, (1848) 2 H. L. C. 239; *Davis v. May*, (1815) 19 Ves. 382; *Neesom v. Clarkson*, (1842) 4 H. 104; *Shepherd v. Elliott*, (1819) 4 Mad. 254.

The proceeds of sale of part of the property by a mortgagee in possession are brought into the account of what is due on the mortgage and credited to the mortgagor at the date on which it was received, but the mortgagor is not entitled to have a rest made as on that day in the accounts of rents and profits. *Thompson v. Hudson*, *supra*; *Wrigley v. Gill*, 74 L. J. Ch. 160; [1905] 1 Ch. 241; *Ainsworth v. Wilding*, 74 L. J. Ch. 256; [1905] 1 Ch. 435; *Wilding v. Saunderson*, *supra*.

Sale of part of the mortgaged property.

If a mortgagee is not liable to have an account taken with rests when he enters, he does not become so liable because in time the receipts discharge the arrears. *Latter v. Dashwood*, (1834) 6 S. 462; *Finch v. Brown*, (1840) 3 B. 70; *Thornycroft v. Crockett*, *supra*; *Morris v. Islip*, (1855) 20 B. 654.

Discharge of interest by receipts.

But he may become so liable, when mortgagee and mortgagor settle an account, from which it appears either that no interest was due or that any interest which was due was satisfied as interest by being converted into

principal, and yet the mortgagee remains in possession of rents more than sufficient to satisfy the interest of the whole principal as shown by the settled account. *Wilson v. Cluer*, (1840) 3 B. 136.

Possession
compelled
by mort-
gagor's
default.

Mere taking possession is not decisive, if the mortgagee was driven to take possession for the protection of the mortgaged property; as where a leasehold house is endangered by the mortgagor's neglect to execute repairs. *Patch v. Wild*, (1861) 30 B. 99.

By wrong-
ful claims.

So, when possession is necessary to resist wrongful claims. *Horlock v. Smith*, (1844) 1 Coll. 287.

Mortgagee
claims
to be
absolute
owner.

Annual rests have also been allowed where the mortgagee resisted redemption by a claim to be absolute owner. *Incorporated Society v. Richards*, (1841) 1 Dr. & W. 334.

The ground of the decision was that, having claimed as owner, he could not when defeated turn round and avail himself of his character as mortgagee to account in any other way than as a wrongful possessor. *National Bank of Australasia v. United Company*, (1879) 4 A. C. 391.

Form of
accounts
with rests.

An account with rests may be taken in two forms, which produce the same result. The one assumes that each year the surplus of receipts over payments eats into the capital, and, therefore, allows the mortgagee to charge interest only on a constantly diminishing principal. The other assumes that the principal remains the same, but that the mortgagee holds each balance of receipts over payments for the mortgagor, and is charged with compound interest on such balances. *Cotham v. West*, Seton, 1066; *Wilson v. Metcalfe*, *Ashworth v. Lord*, *supra*.

Interest.

When an account is taken with rests, they are, as a rule, annual. The rate of interest is that charged in

the mortgage deed. If none is there fixed, the rate will be at 4 per cent. *Ashworth v. Lord, supra.*

It is not clear from the cases how far persons interested in the equity of redemption are bound by accounts, in their absence settled out of Court or taken in an action between a mortgagee and the other persons interested in the equity of redemption. Settled accounts in some cases bind absent parties.

The general rule seems to be, that when the accounts are fairly taken, they are *primâ facie* binding, and absent parties are only at liberty to surcharge and falsify. By "fairly" is meant not only that fraud is absent, but that the persons who, when the accounts are taken, represent the equity of redemption are substantially interested. *Wrixon v. Vize*, (1842) 2 Dr. & W. 192. When fairly taken.

Contingent remaindermen are bound by accounts taken in an action properly brought. *Allen v. Papworth*, (1748) 1 Ves. sen. 163. Contingent remaindermen.

Remaindermen, vested as well as contingent, are bound by accounts taken in an action properly brought against a tenant for life of the mortgaged property. *Allen v. Papworth, supra.* Vested remaindermen.

Subsequent incumbrancers are bound by accounts taken against the mortgagor. *Needler v. Deeble*, (1678) 1 Ch. Ca. 299; *Williams v. Day*, (1680) 2 Ch. Ca. 32. Subsequent incumbrancers.

A jointress is bound by accounts taken against an assignee of the husband. *Knight v. Bampfield*, (1683) 1 Vern. 179. Jointress.

The mortgagor is bound by accounts taken in an action to which he was a party, though not necessarily a party to taking the accounts. *Farquharson v. Seton*, (1828) 5 R. 45. Mortgagor.

To open an account *primâ facie* binding, fraud must be shown. To surcharge and falsify, errors must be alleged and proved. *Blagrove v. Routh*, (1856) 2 K. & J. 509; 8 D. M. & G. 620. Surcharge or falsify.

The fraud alleged must be specified ; a mere general allegation of fraud without showing a false item in the account is not sufficient. *Mangles v. Dixon*, (1852) 3 H. L. C. 737 ; *Kinsman v. Barker*, (1808) 14 Ves. 579.

Between
solicitor
and client.

The same necessity for specific instances of fraud or errors exists when accounts have been settled in a mortgage transaction between solicitor and client to secure costs ; but the position of the parties, undue pressure, and other similar circumstances, may show that the accounts were not really settled. *Lawless v. Mansfield*, (1841) 1 Dr. & W. 557 ; *Waters v. Taylor*, (1837) 2 My. & Cr. 526 ; *Blagrove v. Routh*, *supra*.

Between
assignee
and as-
signor of
mortgage
debt.

Accounts settled between mortgagee and his assignee can in no way bind the mortgagor ; but accounts settled between the mortgagee and mortgagor before notice to the mortgagor of any assignment of the mortgage bind the assignee. *Mathews v. Walwyn*, (1798) 4 Ves. 118 ; *Porter v. Hubbart*, (1672) 3 Ch. R. 78 ; *Chambers v. Goldwin*, (1801) 9 Ves. 254 ; *Mangles v. Dixon*, (1852) 3 H. L. C. 737 ; *Bickerton v. Walker*, (1885) 55 L. J. Ch. 227 ; 31 C. D. 151.

Payments of interest or on account of capital made by a mortgagor to a mortgagee after, but without notice of a transfer, must in the absence of collusion be allowed to a mortgagor as against a transferee. *Williams v. Sorrell*, (1799) 4 Ves. 389 ; *Norrish v. Marshall*, (1821) 5 Madd. 475 ; *Dixon v. Winch*, 69 L. J. Ch. 465 ; [1900] 1 Ch. 736.

In *Turner v. Smith*, the solicitor of the mortgagor became the mortgagee, the mortgagor paid him all that was due under the mortgage but did not require a reconveyance or delivery of the deeds. The mortgagee solicitor, suppressing the fact of payment off, conveyed the legal estate and handed the deeds to an innocent mortgagee,

who made no inquiry from the mortgagor as to the state of the account. It was held that the debt was extinguished, and that no transferee could treat the debt as a subsisting charge upon the property. The mortgagor obtained judgment for a reconveyance. *Turner v. Smith*, 70 L. J. Ch. 144; [1901] 1 Ch. 213.

The duty of a mortgagee in possession to keep and furnish accounts has been the subject of conflicting views. It has been considered his duty, if not to furnish, at least to keep accounts and allow a mortgagor reasonable facilities for inspection, for otherwise a mortgagor could not ascertain the right amount to tender. *Powell v. Trotter*, (1861) Dr. & Sm. 388.

Duty of mortgagee to keep accounts.

But it has been pointed out that a mortgagee is not a trustee until receipt of all that is due, and consequently is under no obligation to furnish a mortgagor with accounts, except in an action to redeem or foreclose the property. *Parkinson v. Hanbury*, (1867) 2 H. L. 1; *Gaskell v. Gosling*, 65 L. J. Q. B. 435; [1896] 1 Q. B. 669.

Mortgagor's right to accounts from mortgagee.

In the accounts ordered in the judgment of such an action, a mortgagee in possession must set out what he has received himself, and what his agent has received, with fair details, in order that the mortgagor may be able to surcharge him what he or his agent ought to have received. *Noyes v. Pollock*, (1885) 55 L. J. Ch. 518; 30 C. D. 336.

When ordered in a judgment.

The plaintiff in a redemption action, without waiting for the accounts directed by the judgment, can require by interrogatories a mortgagee in possession admitting himself to be redeemable, to set out in his answer such particulars as will sufficiently show the state of the accounts, and what is due to him. *Elmer v. Creasy*, (1873) 9 Ch. 69.

Interrogatories and particulars.

Second mortgagee entitled to know securities.

Also, when the action is brought by some person who has not himself the knowledge, as, for instance, second mortgagee, the mortgagee must answer what securities he holds for the debt. *West of England Bank v. Nickolls*, (1877) 6 C. D. 613; *Union Bank of London v. Manby*, (1879) 13 C. D. 239.

Vexatious proceedings.

Taking the accounts directed by a judgment may be stayed, if the mortgagors refuse to give security for costs, and it is shown that the proceedings are vexatious. *Taylor v. Mostyn*, (1833) 25 C. D. 48; *Exchange and Hop Warehouses, Limited v. Association of Land Financiers*, (1886) 56 L. J. Ch. 4; 34 C. D. 195.

Ord. XV.

Apparently, neither a foreclosure decree can be made under Ord. XV., R. S. C., nor can a mortgagor get accounts under that order. *Smith v. Davies*, (1884) 28 C. D. 650; *Blake v. Harvey*, (1885) 29 C. D. 827; *Bissett v. Jones*, (1886) 55 L. J. Ch. 648; 32 C. D. 635.

Ord. LV., r. 5a.

Both mortgagee and mortgagor can proceed under Ord. LV., r. 5a, R. S. C. In a redemption action under this order the mortgagor can obtain accounts, but only at the risk of being foreclosed, if he fail to redeem.

Particulars.

Particulars of receipts need not be given in an action which asks for an account, for that would be in effect to give two accounts.

When plaintiff asks for definite sum.

Particulars will be ordered when plaintiff asks for a definite sum. *Augustinus v. Nerinckx*, (1880) 16 C. D. 13; *Blackie v. Osmaston*, (1884) 54 L. J. Ch. 473; 28 C. D. 119.

Items particularly within his knowledge.

Or when the items are particularly within his knowledge, and the sum claimed is only indefinite in the sense that the plaintiff refuses to state it.

In a case where a mortgagor brought his action for re-assignment of the property, or in the alternative, if it should be held that he had not paid the whole debt,

accounts, and redemption, and the mortgagee stated in his defence that in spite of numerous sums received on account, there was still a large balance due, and counterclaimed for an account and foreclosure, the mortgagee was ordered to give particulars of the sums received on account. *Kemp v. Goldberg*, (1887) 36 C. D. 505.

On taking the account special circumstances affecting Pleading. the amount due to the mortgagee cannot be considered unless a special direction has been inserted in the order directing the Master to consider them. *Sanguinetti v. Stuckey's Banking Company*, 65 L. J. Ch. 340; [1896] 1 Ch. 502; *Dunstan v. Patterson* (1847) 2 Ph. 344.

CHAPTER IX.

POSSESSION.

Possession
by mort-
gagor.

THE possession by the mortgagor until demand by the mortgagee is rightful ; therefore no occupation rent before demand can be charged against the mortgagor for that part of the mortgaged land which is in his own possession ; nor can there be had an account of back rents for that portion which is in the hands of tenants, so far as they had accrued due and been received by the mortgagor before the mortgagee's demand for possession. *Jolly v. Arbuthnot*, (1859) 28 L. J. Ch. 547 ; 4 De G. & J. 224 ; *Yorkshire Banking Company v. Mullan*, (1887) 56 L. J. 562 ; 35 C. D. 125.

Seisin by
mort-
gagor.

An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin. *Per* Lord Hardwicke, *Casborne v. Scarfe*, (1737) 1 Atk. 603.

A mortgagor in possession of a freehold tenement within a manor is so seised of that tenement that, on his death, the lord may claim his best beast as a heriot pursuant to the custom. *Copestake v. Hoper*, [1907] 1 Ch. 366.

Descrip-
tion of
relation
between
mortgagor
and mort-
gagee.

The relation of a mortgagor in possession to his mortgagee has been described as that of tenant at will, tenant by sufferance, or tenant *sui generis*. The following is from a judgment of Sir Thomas Plumer, M.R. :—

“ The argument from there being a tenancy at will arises

from a mere fiction; for there is no actual tenancy—no demise, either express or implied. The mortgagor has not even the rights of a tenant at will; he may be turned out of possession without notice, and is not entitled to the emblements. It is only *quodam modo* a tenancy at will, as Lord Mansfield says in *Moss v. Gallimore*, (1779) Doug. 279. We cannot push it to that extent, reasoning on the supposed relation of landlord and tenant, which is not founded in fact. The relation of mortgagor and mortgagee is peculiar; in a court of equity the former is considered as the owner; and that is the nature of the contract between them; the tacit agreement is, that he is to be the owner if he pays." *Christophers v. Sparke*, (1820) 2 J. & W. 223.

A proviso in a mortgage deed, executed by a mortgagee, for the mortgagor to retain possession, will amount to a re-demise by the mortgagee if a certain period is fixed for the mortgagor to remain in possession, as until default. *Wilkinson v. Hall* (1837) 6. L. J. C. P. 82; 3 Bing. N. C. 508.

Re-demise
by affirmative
covenants.

Covenants giving a mortgagee power to enter, or restricting his right to immediate possession, do not imply a re-demise to the mortgagor. *Roylance v. Lightfoot*, (1841) 11 L. J. Ex. 96; *Moore v. Shelley*, (1883) 52 L. J. P. C. 35; 8 A. C. 285.

Negative
covenants

The distinction seems to be, that affirmative covenants by the mortgagee that the mortgagor shall hold for a determinate period may amount to a re-demise to the mortgagor, but no inference in favour of a re-demise can be drawn from negative covenants.

Period
fixed of
duration
of ten-
ancy.

The object of making a mortgagor in possession a tenant to the mortgagee, was that the mortgagee might have, as an additional security to the land, a landlord's right of distress over all chattels on the premises demised.

Of commence-
ment of
tenancy.

The period at which the tenancy of the mortgagor is to commence must either be fixed in the deed or provision made that it should be fixed by some definite event, such as default, or the giving of notice by the mortgagee of an intention to treat the mortgagor as tenant. *Clowes v. Hughes*, (1870) 89 L. J. Ex. 62; L. R. 5 Ex. 160.

Attorn-
ment.

An attornment clause, expressly creating the relation of landlord and tenant, gives the mortgagee the right to recover possession under Ord. III., r. 6, and Ord. XIV. *Daubuz v. Laxington*, (1884) 53 L. J. Q. B. 283; 13 Q. B. D. 847; *Hall v. Comfort*, (1886) 56 L. J. Q. B. 185; 18 Q. B. D. 11; *Mumford v. Collier*, (1890) 59 L. J. Q. B. 552; 25 Q. B. D. 279.

The Bills
of Sale
Act.

The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 6:—
“Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized under such power of distress; provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.” The Amendment Act of 1882 (45 & 46 Vict. c. 43) renders an attornment clause unavailing to give a power of distress unless registered as a bill of sale. Such an attornment clause is void as to the chattels that might be distrained under it, but it is good so far as it creates the

relation of landlord and tenant. *In re Willis, Ex parte Kennedy*, (1888) 57 L. J. Q. B. 634; 21 Q. B. D. 384; *Mumford v. Collier, supra*; *Green v. Marsh*, 61 L. J. Q. B. 442; [1892] 2 Q. B. 330.

An attornment at a rent of a peppercorn, when demanded, seems free from any objection under the Bills of Sale Act, for it can give no power to distrain.

The proviso in sect. 6 of the Act of 1878 applies only where the mortgagee, having previously taken possession of the mortgaged premises, has demised them to the mortgagor. *In re Willis, Ex parte Kennedy, supra*.

It has been thought that the effect of an attornment clause is to make the mortgagee liable to a subsequent incumbrancer for wilful default in not collecting the rent thereby reserved, as though he were a mortgagee in possession. *In re Stockton Iron Furnace Co.*, (1879) 48 L. J. Ch. 417; 10 C. D. 335; *Ex parte Jackson*, (1880) 14 C. D. 725; *Ex parte Punnett*, (1880) 50 L. J. Ch. 212; 16 C. D. 226; *Ex parte Harrison* (1881) 18 C. D. 127. But this view was rejected in *Stanley v. Grundy*, (1883) 52 L. J. Ch. 248; 22 C. D. 478, except where possession has in fact been taken.

Liability
as mort-
gagee in
possession.

Where the mortgagor is in occupation of the mortgaged land, there might be rent which would give the mortgagee a right of distress. Occupation by a mortgagor and payment of interest are not evidence of such a tenancy in themselves but might be evidence, if they were referable to an attornment clause. *Scobie v. Collins*, 64 L. J. Q. B. 10; [1895] 1 Q. B. 375.

An equitable mortgagee can bring an action of ejectment if the relation of landlord and tenant exists between him and the mortgagor.

Ejectment
by equit-
able mort-
gagee.

An attornment by a mortgagor to a second or equitable mortgagee is valid, notwithstanding the fact that the

Tenant by
estoppel
where the

truth
appears.

mortgagor has already attorned tenant to the first mortgagee of the same property. *Ex parte Punnett, supra*; *Jolly v. Arbuthnot*, (1859) 28 L. J. Ch. 547; 4 De G. & J. 224.

In other words, where it is the manifest intention of the parties that the second mortgagee should have the remedies of a landlord, a mortgagor who has attorned is estopped from denying that the legal reversion is in the second mortgagee though the deed shows that it is outstanding in the first mortgagee. *Morton v. Woods*, (1869) 38 L. J. Q. B. 81; 4 Q. B. 293.

Reversion
by
estoppel.

A right of distress is incident to a legal reversion, but there may be a reversion by estoppel, which has the incidents of a legal reversion, that is, when one party is let into possession by the other, under an agreement that the one shall be tenant and the other landlord, both parties are estopped, as between themselves, from denying the other's title. The estoppel may be by matter *in pais*. *Morton v. Woods, supra*.

Rights of
mortgagee
against
mortgagor
in possession.

The rights of a mortgagee against a mortgagor in possession are :—(1) to sue upon the covenant for payment of the money; (2) to foreclose; (3) to eject. *Heath v. Pugh*, (1881) 6 Q. B. D. 345.

Eject-
ment.

A legal mortgagee, immediately after the execution of the mortgage and before default, has a right to enter and eject the mortgagor (*Roylance v. Lightfoot*, (1841) 11 L. J. Ex. 966; 8 M. & W. 553), unless there was in the mortgage what amounted to a re-demise until default. *Cole on Ejectment*, 462.

Repay-
ment a
defence.

In answer to an action for the recovery of the mortgage money, or for ejectment to recover possession of mortgaged lands, the mortgagor may pay the amount due into Court under 7 Geo. 2, c. 20, s. 1, and the Court can thereupon compel the mortgagee to reconvey (*Ryland*

v. Smith, (1835) 5 L. J. Ch. 186; 1 My. & Cr. 53; *Bourton v. Williams*, (1870) 39 L. J. Ch. 800; 9 Eq. 297; 5 Ch. 655); or he may rely on any equitable ground of defence which he may have. (Jud. Act, 1873, s. 24 (2).)

If a mortgagor, while in possession, allows judgment to go against him by default in an action brought by a stranger to obtain possession of the mortgaged property, the mortgagee may intervene even after judgment. *Jacques v. Harrison*, (1884) 53 L. J. Q. B. 137; 12 Q. B. D. 165.

Mortgagor's default in resisting legal proceedings.

A mortgagor in possession can sue to restrain, or for damages for any injury to the mortgaged property, and the mortgagee need not be co-plaintiff. If any question arises substantially affecting the mortgagee, he may be added as a defendant. *Fairclough v. Marshall*, (1878) 4 Ex. D. 37; *Van Gelder v. Sowerby Bridge Soc.*, (1890) 59 L. J. Ch. 583; 44 C. D. 374.

Right to take proceedings while mortgagor is in possession.

Upon taking possession a mortgagee is entitled to all rents payable by the tenants but not to back rents already paid to the mortgagor. *Thomas v. Brigstocke*, (1827) 4 Russ. 64.

Back rents.

A mortgagee, either legal or equitable, if he is in possession of the mortgaged property can sue a wrongdoer for any injury to his possession and a mortgagee, if he is the reversioner, can sue in respect of any wrongful act which will endure and be a continuing injury to his reversion.

Damages for injury or trespass.

But after entry by a mortgagee of land his right of possession relates back to the time at which his legal right to enter accrued, so that an equitable mortgagee, who has by contract a right of entry, can, when in possession of the mortgaged land, sue for damages to the possession committed prior to his entry, if at the time of the trespass, his right of entry could have been enforced. In such a

case, he stands in the shoes of the mortgagor and the wrongdoer cannot dispute his title on the ground that he has not the legal estate.

Injunction without taking possession.

A mortgagee can, without going into possession or applying for a receiver, obtain an injunction to prevent the subject-matter of his security from being destroyed or seriously injured. *Legg v. Mathieson*, (1860) 29 L. J. Ch. 385; 2 Giff. 71.

The alleged trespassers have, it would seem, the right to demand that all persons entitled to receive the damages, should be made parties so that the whole wrong for which they are alleged to be liable, can be determined in the action. *The Ocean Accident and Guarantee Corporation, Ltd. v. The Ilford Gas Co.*, 74 L. J. K. B. 799; [1905] 2 K. B. 498.

Growing crops.

A mortgagee of land taking actual possession of the land before severance of the growing crops has the right to sever and take the crops. *Liverpool Marine Credit Co. v. Wilson*, (1872) 41 L. J. Ch. 798; 7 Ch. 507; *Bagnall v. Villar*, (1879) 48 L. J. Ch. 695; 12 C. D. 812.

Leases made before mortgage.

By 32 Hen. 8, c. 34, and 4 Anne, c. 3, ss. 9, 10, a mortgagee as assignee of the reversion is bound by and can take advantage of the covenants, rights, and liabilities contained in a lease made by the mortgagor before the mortgage, but by sect. 10 of the later statute the tenant would not be prejudiced by any act done by him, such as payment of rent to the mortgagor, before he has had notice of the mortgage.

After notice, a mortgagee is entitled to all rent in arrear at the time of notice, as well as to what accrues afterwards. *Moss v. Gullimore*, Smith's L. C.

The assignee of a mortgage, if the assignment contains no words of transfer beyond those incidental to the transfer of the mortgage, cannot claim rent in arrear at the time

of the assignment, nor, it would seem, can a mortgagee, without express words, claim rent in arrear at the time of the mortgage. *Salmon v. Dean*, (1851) 8 M. & G. 344.

Payments of rent, before it is due, are not within the protection of the Act. *De Nicholls v. Saunders*, (1870) 39 L. J. C. P. 297; 5 C. P. 589; *Cook v. Guerra*, (1872) 41 L. J. C. P. 89; 7 C. P. 132.

Pre-pay-
ments of
rent.

The covenants in the lease whereof the mortgagee by the statutes can take advantage are inherent covenants; i.e., such covenants as do concern the thing granted, and tend to the supportation of it. *Sheppard's Touchstone*, 176. The assignee of the reversion can enforce any covenants, the benefit of which runs with the reversion. *Chapman v. Smith*, [1907] 2 Ch. 97.

Assignee's
rights on
covenants
running
with the
land.

An equitable mortgagee has no legal right to possession. Nor has he a right to the receipt of rents. In order to entitle him to enforce the payment of rents from the tenants of the mortgaged property, he must take out equitable execution as by obtaining the appointment of a receiver, or he can apply for an order of sale, in which case he is entitled to the rents from the date of his application. An equitable mortgagee who has received rent from a tenant after notice that he claimed it as equitable mortgagee will not be ordered to refund it to the tenant. *Finch v. Tranter*, 74 L. J. K. B. 345; [1905] 1 K. B. 427.

Recovery
by equit-
able mort-
gagee of
rent.

Prior to the Judicature Act, 1873, the mortgagor being no longer the owner of the reversion, could not sue in ejectment; he might, however, distrain for the rent, in the name and as the bailiff of the mortgagee, under an implied authority from him to enforce payment of the fund out of which his interest may be paid. And even though he distrained as for rent due to himself, he might justify as the bailiff of the mortgagee.

Mort-
gagor's
right to
recover
rent.

Judica-
ture Act,
1873,
s. 25 (5).

Judicature Act, 1873, s. 25 (5) :—" A mortgagor, entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

Ejectment
by mort-
gagor.

The construction of this section has been held to be that a mortgagor entitled to possession can sue for possession, and a mortgagor entitled to receipt of the rents and profits may sue for them. The section does not give to a mortgagor of land, subject to a lease, the right to re-enter for breach of the covenants of the lease. *Mathews v. Usher*, 69 L. J. Q. B. 856; [1900] 2 Q. B. 585.

In *Mathews v. Usher*, the mortgage and lease were prior in date to the Judicature and Conveyancing Acts. The principle of that case has been held applicable where both mortgage and lease were subsequent in date to these Acts. *Molyneux v. Richards*, 75 L. J. Ch. 39; [1906] 1 Ch. 84.

Tenancy
at will.

A tenancy at will is determined by a legal mortgage of the premises and knowledge of the mortgage by the tenant at will. After the mortgage the mortgagee has power to create a tenancy at will good as against himself. *Jarman v. Hale*, 68 L. J. Q. B. 681; [1899] 1 Q. B. 994.

Ejectment
by equit-
able mort-
gagee.

A puisne mortgagee, although the legal estate is outstanding in a prior mortgagee, can bring an action of ejectment against the mortgagor to recover possession of the mortgaged property, if he is himself at the time of

action brought entitled to the possession of the land, as if the legal mortgagees had covenanted not to enter into possession, so long as their interest was punctually paid. *Antrim Land Co. v. Stewart*, [1904] 2 K. B. D. Ir. 357.

Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 18 (1):
 —“A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

Leasing powers of mortgagor and of mortgagee in possession.

“(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

“(3.) The leases which this section authorizes are—

“(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

“(ii.) A building lease for any term not exceeding ninety-nine years.

“(4.) Every person making a lease under this section, may execute and do all assurances and things necessary or proper in that behalf.

“(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

“(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

“(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

“(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which

execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

“(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connexion with building purposes.

“(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

“(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

“(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

“(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

“(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers

of leasing, or having reference to leasing ; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

“(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

“(16.) This section applies only in case of a mortgage made after the commencement of this Act, but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

“(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.”

Sects. 10 and 11 of the same Act make the rent and benefit of the lessee's covenants and the obligation of the lessor's covenant run with the reversion, notwithstanding severance of the reversion. *Municipal Building Society v. Smith*, (1888) 58 L. J. Q. B. 61 ; 22 Q. B. D. 70.

Covenants
run with
reversion.

The mortgagee is entitled to the benefit of and bound by a lease made in conformity with the Act, in the same way as in an ordinary real settlement the exercise of a power of leasing by trustees, although they might have no

Operation
of the
statute.

estate in the settled property, would bind all those entitled to the land under the limitations in the settlement. *Wilson v. Queen's Club*, 60 L. J. Ch. 698; [1891] 3 Ch. 522.

Lease of
estate and
sporting.

A mortgagor of land, while in possession leased for fourteen years the mortgaged house, together with the furniture in it and land adjoining it, and the sporting rights over the remainder of the mortgaged land, which had been let, before the mortgage was created, to agricultural tenants, with a reservation of sporting rights. This lease was held valid against the mortgagee who had foreclosed. *Browne v. Peto*, 69 L. J. Q. B. 869; [1900] 2 Q. B. 653.

Mort-
gagee's
powers
before
notice of
mortgage.

The mortgagee's rights are unaffected by any collateral agreement between the mortgagor and his lessee. The lessee is safe in dealing with the mortgagor until he has had notice from the mortgagee of the mortgage and of his intention to exercise his rights as mortgagee. *Municipal Building Society v. Smith*, *supra*.

Surrender
of statu-
tory lease.

The statute gives the mortgagor power to create a term out of the estate of the mortgagee, and so convert that estate into one expectant on the term granted by the lease. A mortgagor in possession who has granted a lease under the statutory power has no power to accept a surrender of the lease without the concurrence of the mortgagee. *Robbins v. Whyte*, 75 L. J. K. B. 88; [1906] 1 K. B. 125.

Leases not
under the
Convey-
ancing
Act.

Lessees
may be
treated
as tort-
feasors.

Leases made after the mortgage by the mortgagor and not under the Act do not bind the mortgagee.

The mortgagee, on finding such a lessee in occupation of the mortgaged land, may treat him as a trespasser, and bring ejectment without notice, and also may sue for mesne profits for so much of the time as the lessee has held after notice by the mortgagee of his title. *Keech v.*

Hall, 1 Smith's L. C. ; *Gibbs v. Cruickshank*, (1873) 42 L. J. C. P. 278 ; L. R. 8 C. P. 454.

No privity can be assumed between the lessee and the mortgagee, but evidence is admissible to show that in fact the mortgagor in granting the lease acted as agent for the mortgagee. *Corbett v. Plowden*, (1884) 54 L. J. Ch. 109 ; 25 C. D. 678.

Mortgagor the agent of the mortgagee.

Notice by mortgagee to lessee in exercise of his right as mortgagee to pay the rent to him, and payment accordingly, destroys the old lease and creates a tenancy between mortgagee and lessee which may be and ordinarily would be, a yearly one on the terms, so far as applicable, of the old lease. In every case the terms of the implied lease are ascertained by evidence and inference from the facts. *Corbett v. Plowden*, *supra* ; *Keith v. R. Garcia & Co. Ltd.*, 73 L. J. Ch. 411 ; [1904] 1 Ch. 774.

New agreement for lease between mortgagee and lessee.

The creation of the new tenancy depends on the agreement of lessee and mortgagee. The mortgagee cannot, by a mere notice, compel the lessee to be his tenant. *Evans v. Elliott*, (1838) 9 A. & E. 342 ; *Pope v. Biggs*, (1829) 9 B. & C. 245 ; *Underhay v. Read*, (1887) 57 L. J. Q. B. 129 ; 20 Q. B. D. 209 ; *Towerson v. Jackson*, 61 L. J. Q. B. 85 ; [1891] 2 Q. B. D. 484.

Evidence of such agreement.

Mere continuance in possession after receipt of such a notice does not show an agreement by the tenant to enter into a new tenancy. *Brown v. Storey*, (1840) 1 M. & G. 117 ; *Towerson v. Jackson*, *supra*.

Payment by the lessee to a mortgagee who demanded it and threatened to put the law in force in case of refusal is a good payment against the mortgagor or his assignee. *Johnson v. Jones*, (1839) 9 A. & E. 809 ; *Underhay v. Read*, *supra*.

Payment by lessee good against mortgagor.

A mortgagee, who has recognised the tenant as his tenant, cannot treat him as a trespasser and eject him.

Not conclusive

of new
tenancy.

This recognition is a question of fact in each case. The receipt of money from the tenant is not of itself conclusive, for the mortgagee may have received the money as part of his principal or interest and not as rent. *Doe v. Cadwallar*, (1831) 2 B. & Ad. 473; *Evans v. Elliott*, *supra*.

Meaning
of posses-
sion by
mort-
gagee.

Possession by the mortgagee means the exclusion of the mortgagor from the control of the property, and the assumption of that control by the mortgagee. In the case of a mortgage of a judgment debt, suing out execution amounts to the possession or control of the judgment by the mortgagee in exclusion of the mortgagor. *Williams v. Price*, (1824) 1 S. & S. 581.

After
discharge
of re-
ceiver.

Possession by a first mortgagee will be considered to commence at the date of the service of notice of motion to discharge a receiver appointed in an action by a second mortgagee and not from the date of the actual discharge of the receiver. *Preston v. Tunbridge Wells Opera House, Ltd.*, 72 L. J. Ch. 774; [1903] 2 Ch. 323.

Possession
of part.

Taking possession of part of the mortgaged property does not necessarily subject a mortgagee to the liabilities consequent on taking possession of the whole. *Soar v. Dalby*, (1852) 15 B. 156.

It has been held, that obtaining an injunction to restrain the mortgagor from cutting timber when it diminished the security, was not taking possession of the woods; that taking possession of the rents of a farm was not taking possession of the shooting over the farm; but, in this case, the circumstances were peculiar. The mortgagees took possession of the rents in July, 1876, and the redemption action was commenced in the same year, so that there could have been very little default. *Simmins v. Shirley*, (1877) 46 L. J. Ch. 875; 6 C. D. 178.

Possession
a question
of fact.

The amount of exclusion of the mortgagor and interference by the mortgagee which amounts to taking

possession by the mortgagee must be a question of fact in every case. If when the security is safe and sufficient and interest not in arrear the mortgagee interferes, it would seem to show an intention on his part to manage the property and himself collect his money. *Hippesley v. Spencer*, (1820) 5 Madd. 422; *Humphreys v. Harrison*, (1820) 1 J. & W. 581; *King v. Smith*, (1843) 2 H. 239.

A mortgagee in possession is chargeable on the footing of wilful default. *Noyes v. Pollock*, (1885) 55 L. J. Ch. 513; 32 C. D. 53. Wilful default.

For the form of the account and a mortgagee's liability to have the account taken with annual rests, see p. 144. Form of account.

The account of wilful default extends not only to rents and profits, but to whatever, even of *corpus*, he might have received, but for wilful default since taking possession. *Mayer v. Murray*, (1878) 47 L. J. Ch. 605; 8 C. D. 424; *Charles v. Jones*, (1887) 56 L. J. Ch. 745; 35 C. D. 544. To what it extends.

It is directed as of course, though no charge of wilful default has been made on the pleadings or proved at the trial. *Mayer v. Murray*, *supra*. Is of course.

An entry into possession, not in his character as mortgagee, but as a purchaser under a sale invalid in fact, but reasonably believed to be valid, does not make a mortgagee liable on the footing of wilful default (*Neesom v. Clarkson*, (1844) 4 H. 97; *Parkinson v. Hanbury*, (1867) 36 L. J. Ch. 292; L. R. 2 H. L. 1), or as co-owner (*Steers v. Rogers*, 61 L. J. Ch. 676; [1893] A. C. 292), or as agent and solicitor of the mortgagor. *Ward v. Carttar*, (1865) 1 Eq. 29. Entry by mortgagee in another capacity.

The ground of the liability is the exclusion of the mortgagor, and the entry is for the purpose of recovering both principal and interest, and, the estate being, in the eye of the Court, a security only for the money, the Court Reason of mortgagee's liability to account of wilful default.

requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who is entitled to it. *Kensington v. Bouverie*, (1859) 7 D. M. & G. 184; *Noyes v. Pollock*, *supra*.

Mort-
gagee's
liability
continues
after as-
signment.

A mortgagee who once enters into possession cannot escape the responsibility, which he has assumed, by relinquishing possession; he remains liable to account on the footing of wilful default, even after assignment, if voluntary, but the rule does not apply where the Court orders redemption and directs the mortgagee to transfer the property. *Hall v. Heward*, (1886) 55 L. J. Ch. 604; 32 C. D. 480; *Prytherch v. Williams*, (1889) 59 L. J. Ch. 79; 42 C. D. 590.

Letting.

Brewer mortgagees, letting subject to a condition that the lessee should take beer only from them, were charged with the additional rent which might have been obtained but for such condition, but not with the profits derived from the sale of the beer. *White v. City of London Brewery Co.*, (1888) 58 L. J. Ch. 855; 42 C. D. 237.

Only fair
rent re-
quired.

In the absence of wilful default, a mortgagee is not concerned to get more than a fair rent, unless the mortgagor has pointed out to him some way in which the property may reasonably be made more productive. *Hughes v. Williams*, (1806) 12 Ves. 493; *Brandon v. Brandon*, (1862) 10 W. R. 287.

Specula-
tion.

He is not obliged to enter into the speculation of a large expenditure in the hope that it may improve the mortgaged property. *Rowe v. Wood*, (1822) 2 J. & W. 553.

At his
own risk.

Speculation, if he chooses to speculate, is at his own risk; he can only deduct the cost from the profit, if any. A mortgagee in possession was not allowed in his accounts a sum spent in opening a slate quarry. *Hughes v. Williams*, *supra*; *Bompas v. King*, (1886) 56 L. J. Ch. 202; 33 C. D. 279.

The power of a mortgagee in possession to cast upon the mortgagor the costs of litigation for the protection of the property seems to depend on the question whether the particular litigation is of an expensive and speculative character or the reverse. Litigation.

A receiver will not be appointed adversely to a mortgagee in possession for acts of mismanagement. *Rowe v. Wood, supra.* Mortgagor's remedy for mismanagement.

The remedy of the mortgagor against a mortgagee in possession is to redeem and charge him on taking the accounts.

So long as the property is not a deficient security, the mortgagee who opens mines can be restrained by injunction, on the ground that by so doing, he is destroying the inheritance, and on taking the accounts he will be charged with the value of the inheritance without an allowance for his expenses. *Farrant v. Lovel*, (1750) 3 Atk. 723; *Thornycroft v. Crockett*, (1848) 16 S. 445. Mines.

Where the property is an insufficient security, a mortgagee is entitled to make the most of his property for the purpose of realizing what is due to him, he may open mines. *Millett v. Dary*, (1862) 32 L. J. Ch. 122; 31 B. 470.

An experimental shaft may not be an open mine, but assuming that a mine is open, pursuing the same vein on the same mortgaged land is not opening a new mine. *Elias v. Snowden*, (1870) 48 L. J. Ch. 811; 4 A. C. 454; *Maynard's Settled Estates*, 68 L. J. Ch. 609; [1899] 2 Ch. 347.

Opening mines when the security is a deficient one or, it would seem, working open mines when the security is not deficient, is a speculation into which the mortgagee may enter; but subject to this risk, expenses can only be

charged against profits, and any profit goes in reduction of the mortgage debt. No loss can be charged against the mortgagor. *Millett v. Davy, supra.*

In the case of a mortgage of a colliery, a mortgagee can escape the onerous liability of working it himself, by the appointment of a receiver, for there is a material difference between a mortgage of land with seams of coal underneath, and a mortgage of a colliery. *County of Gloucester Bank v. Rudry, &c.*, 64 L. J. Ch. 451; [1895] 1 Ch. 629.

For coal obtained in illegal or improvident working by himself, or by any other person with his authority, the mortgagee is chargeable with the value at the pit's mouth, subject to a deduction for the cost of bringing it to the surface, but not the cost of severance. *Taylor v. Mostyn*, (1886) 55 L. J. Ch. 898; 33 C. D. 226.

Liabilities
for in-
juries.

For injuries due to the mortgagee's carelessness, as by mining in such an improper way as to let in the sea, a mortgagee is liable. *Taylor v. Mostyn, ibid.*

Timber.

A mortgagee, where the mortgage is by deed, while in possession has power to cut and sell timber and other trees ripe for cutting and not planted or left standing for shelter or ornament, or to contract for any such cutting or sale, to be completed within any time not exceeding twelve months from the making of the contract. Conveyancing Act, 1881, s. 19, sub-s. (iv.).

A mortgagee out of possession is not as of course entitled to an injunction to restrain the mortgagor from cutting timber if the security is a sufficient one. *King v. Smith*, (1842) 2 H. 243; *Hampton v. Hodges*, (1803) 8 Ves. 105.

On proof that the security is a deficient one, the mortgagee has a right to restrain the mortgagor from committing waste, as by cutting timber, or reducing mort-

gaged tolls. *Lord Crewe v. Edleston*, (1857) 3 Jur. N. S. 1061; 1 De G. & J. 93.

This right of a mortgagee is an absolute one, and is unaffected by the fact that the timber is ripe for cutting, and will deteriorate if left standing. *Harper v. Aplin*, (1886) 54 L. T. 383.

Default in payment of interest would be evidence that a security is not a sufficient one. If the interest is not in arrear the amount by which the mortgaged property should exceed in value the debt is rather a matter of prudence than of actual value. The cutting would be improper if it substantially impairs the value, which was the basis of the contract between the parties at the time it was entered into. *King v. Smith*, *ibid*.

Under just allowances, a mortgagee in possession is entitled to charge for necessary repairs. *Eyre v. Hughes*, (1876) 45 L. J. Ch. 395; 2 C. D. 148; *Sandon v. Hooper*, (1843) 12 L. J. Ch. 309; 6 B. 246. Also for sums reasonably necessary for the prudent management of the property, and not a remuneration for the personal trouble of the mortgagee. *Chambers v. Goldwin*, (1802) 9 Ves. 254; *Broad v. Selfe*, (1863) 11 W. R. 1036; 9 Jur. N. S. 885; *Barrett v. Hartley*, (1866) 2 Eq. 789; *James v. Kerr*, (1889) 58 L. J. Ch. 355; 40 C. D. 449; see p. 269.

A mortgagee in possession or a receiver appointed by him may deduct losses of a business carried on in the mortgaged premises from the receipts. The balance of losses may be charged against the mortgaged property, if the business is included in the mortgage, and it was agreed by the parties that the mortgagee when in possession should have the power of management. *Bompas v. King*, (1886) 33 C. D. 279; *White v. Metcalf*, 72 L. J. Ch. 712; [1903] 2 Ch. 567.

An occupation rent can only be charged for actual

A sufficient security.

Just allowances. Repairs.

Management.

Losses.

Occupation rent.

occupation; possession is not sufficient. *Trulock v. Robey*, (1846) 15 S. 265.

But, where the circumstances justify it, there may be a charge for wilful default in leaving the property unoccupied. *Shepard v. Jones*, (1882) 21 C. D. 469.

Repairs
not neces-
sary.

A mortgagee, in order to obtain an inquiry as to expenditure, on repairs not necessary, being substantial improvements, need not prove at the hearing what precise sums were so laid out; yet no inquiry will be granted on his bare allegation, without evidence that he has laid out money for the purpose. *Tipton Green Colliery v. Tipton Moat Colliery*, (1877) 42 L. J. Ch. 152; 7 C. D. 192.

He must also show that the works are *primâ facie* improvements.

The inquiry will be whether the outlay has increased the value of the property, and the mortgagee will be allowed that increase. *Henderson v. Astwood*, [1894] A. C. 150.

Moderate
in amount.

The outlay for the improvement must be moderate in amount; for a mortgagor may not be improved out of his property. *Sandon v. Hooper*, (1843) 14 L. J. Ch. 120.

Mort-
gagor's
assent.

An expenditure by a mortgagee in possession which would otherwise be unreasonable, may be allowed on proof that the mortgagor assented to it. *Shepard v. Jones*, *supra*.

Repairs by
receiver.

The cost of necessary or proper repairs executed by a receiver, who has been appointed in pursuance of the powers given by the Conveyancing Act, and paid for out of rents and profits on direction in writing of the first mortgagee may be allowed in the accounts taken between first and second mortgagee. Conveyancing Act, 1881, s. 24, sub-s. (8) (iii.). *White v. Metcalf*, *supra*.

Interest
on money
spent on
repairs.

In some cases interest at the rate reserved in the mortgage deed has been allowed to the mortgagee on the money expended on necessary repairs, but in the Court

of Appeal this allowance, on either necessary repairs or lasting improvements, was said to be very unusual. *Wrigley v. Gill*, 75 L. J. Ch. 210; [1906] 1 Ch. 165.

It is suggested (Seton, 6th ed. p. 1978) that interest should only be allowed when the rents are less than the interest, so that the repairs are done by expenditure out of the mortgagee's pocket.

If the selling price of mortgaged property sold by the mortgagee has been increased by an expenditure incurred by him, he is, in an action by the mortgagor for an account of the proceeds, entitled to an allowance for that expenditure, though it may be such that it could not be allowed in a redemption action. *Shepard v. Jones*, *supra*.

Expenditure in-
creasing
sale price.

Where a mortgagee entered into possession at a time when the mortgaged property was unproductive, and expended sums of his own on repairs and lasting improvements, and then remained in possession many years after he had received out of the property all that was due to him, simple interest only was charged on both sides of the account. The mortgagee was allowed interest at the current rate on his expenditure from the date of the expenditure, and was charged interest on the balances in his hands from the commencement of the action. *Quarrell v. Beckford*, (1816) 1 Madd. 269.

Form of
account.

But in a later case, the mortgagee was charged with interest on the balance in his hand from the time when he had paid himself in full. *Charles v. Jones*, (1886) 56 L. J. Ch. 745; 35 C. D. 544.

There is no authority which decides that sums spent on necessary repairs or preservations can be allowed to a puisne mortgagee in possession against a prior mortgagee. *Landowners West of England and South Wales Co. v. Ashford*, (1880) 50 L. J. Ch. 276; 16 C. D. 411.

Repairs or
salvage by
puisne
mort-
gagee.

Licensed
premises.

Mortgagees can appeal from a refusal to renew the licence. The tenant in this case wished to defeat the right of the mortgagees, who had also been appointed by power of attorney to act for the tenant in respect of licensing matters, so that the mortgagees were persons who had a right to have the licence renewed, and it was, therefore, held that they were persons aggrieved within the meaning of 9 Geo. 4, c. 61, s. 27. *Garrett v. Justices of Middlesex*, (1884) 53 L. J. M. C. 81; 12 Q. B. D. 620.

Receiver.

A mortgagee may obtain the advantages of a mortgagee in possession, without the liabilities, by the appointment of a receiver.

A receiver may be appointed in three ways:—

1. By the Court, wherever it appears to the Court just or convenient that such order should be made. (Judicature Act, 1873, s. 25, sub-s. (8).)
2. By the mortgagee under an express power in the mortgage deed.
3. By the mortgagee under the Conveyancing Act, 1881, ss. 19, 24.

Position of
receiver.

A receiver appointed by the Court is an officer of the Court. He is entitled to the protection of the Court from interference with the discharge of his duties, and accountable to it for his acts and defaults. A receiver appointed by a mortgagee under the Conveyancing Act is deemed to be the agent of the mortgagor who is solely responsible for his acts and defaults. There is no general rule that a receiver appointed by a mortgagee under an express power in the mortgage deed is in every case the agent of the mortgagor. His position is determined by the terms of the deed. *Jeffreys v. Dicksons*, (1866) 35 L. J. Ch. 376; 1 Ch. 183; *Mason v. Westoby*, (1886) 32 C. D. 206; *Owen v. Cronk*, 64 L. J. Q. B. 288; [1895] 1 Q. B. 265; *Gaskell v. Gosling*, 66 L. J. Q. B. 848;

[1896] 1 Q. B. 669; [1897] A. C. 575. *In re Vimbos, Ltd.*, 69 L. J. Ch. 209; [1900] 1 Ch. 470; *Robinson Printing Co., Ltd. v. "Chic," Ltd.*, 74 L. J. Ch. 399; [1905] 2 Ch. 123.

A receiver appointed by the Court cannot purchase the property of which he is receiver without the sanction of the Court, even where the sale is made, not under a decree in the action, but by a mortgagee selling with leave outside the action. *Nugent v. Nugent*, [1907] 2 Ch. 292.

Purchase
by
receiver
without
notice.

The jeopardy, of the security, and default in payment of interest are reasons for the appointment of a receiver by the Court.

A legal mortgagee has no necessity for the appointment of a receiver by the Court, for he can go into possession if he is willing to assume the responsibilities of a mortgagee in possession. An equitable mortgagee may have no power to go into possession. An equitable mortgagee has no absolute right to a receiver but must show good reason why the Court should at his instance take possession by its receiver. *Mason v. Westoby*, *supra*; *Prytherch v. Williams*, (1889) 59 L. J. Ch. 79; 42 C. D. 590; *County of Gloucester Bank v. Rudry*, 64 L. J. Ch. 451; [1895] 1 Ch. 629; *In re Vimbos, Ltd.*, *supra*.

The holders of debentures by way of floating security upon the undertaking and all property, present and future, of the company can obtain a receiver, though nothing is payable under the debentures if the assets of the company are in danger of being seised by the creditors of the company. *Campbell v. London Pressed Hinge Co., Ltd.*, 74 L. J. Ch. 321; [1905] 1 Ch. 576.

Floating
charge.

A receiver and manager can be appointed by the Court if the business carried on upon the mortgaged land is included in the mortgage, as when the business and

Receiver
and
manager.

goodwill of an hotel are expressly included in the security. It is not necessary that the business should be mentioned by name, if the nature of the mortgaged property shows that the business carried on there was included in the mortgage security, as when a colliery was mortgaged. *Truman & Co. v. Redgrave*, 50 L. J. Ch. 880; (1881) 18 C. D. 547; *County of Gloucester Bank v. Rudry*, *supra*; *Whitley v. Challis*, 61 L. J. Ch. 307; [1892] 1 Ch. 64.

Receiver when mortgagee is in possession.

Under ordinary circumstances the Court will not appoint a receiver at the instance of a legal mortgagee who has gone into possession. *Prytherch v. Williams*; *County of Gloucester Bank v. Rudry*, *supra*.

Mortgagee's right when a receiver is in adverse possession.

When a receiver was appointed adversely to the mortgagee, and on an undertaking to pay damages, an occupation rent was charged against him for that part of the property of which the mortgagee could have obtained actual possession, if he had not been prevented by the appointment of a receiver. *Ex parte Warren*, (1875) 10 Ch. 222.

Rents received by receiver.

A mortgagee, restrained from taking possession by the appointment of a receiver in a creditor's action is not necessarily entitled to the rents received by the receiver. Each case will be decided with reference to all the circumstances, and in particular to the nature of the action, and the object of the appointment of the receiver, but *secus* where the rents have been received by a sequestrator for he is not the agent of the parties and rents in his hands are in *custodia legis*. *Hoare v. Owen*, 61 L. J. 541; [1892] 3 Ch. 94.

A first mortgagee who has by motion in an action obtained the discharge of a receiver appointed on behalf of the second mortgagee is treated as having been in possession of the mortgaged property from the date of the service of his notice of motion and therefore entitled

to the rents and profits which from that date came into the hands of the receiver. *Preston v. Tunbridge Wells Opera House, Ltd.*, 72 L. J. Ch. 774 ; [1903] 2 Ch. 323.

The mere fact of an appointment of a receiver by the mortgagee does not prevent the application of Ord. XIV., but if on the evidence there are reasonable grounds for saying that an account of the receiver's receipts must be taken in order to ascertain if the amount claimed is due, it is not a case for the application of Ord. XIV. *Lynde v. Waithman*, 64 L. J. Q. B. 762 ; [1895] 2 Q. B. 180.

An application of Ord. XIV. after the appointment of a receiver.

A receiver who is the agent of the mortgagor as between the mortgagor and mortgagee is also so for all purposes, and payments made by him to strangers within the authority conferred upon him bind the mortgagor. The powers given by s. 24 of the Conveyancing Act do not include a power to pay a debt which does not affect the mortgaged property. *In re Hale, Lilley v. Foad*, 68 L. J. Ch. 517 ; [1899] 2 Ch. 107.

Payments by receiver.

Where a receiver of the rents of the mortgaged property has been appointed by the mortgagee, the mortgagor cannot distrain without the receiver's authority, even after the receiver has refused to do so. *Woolston v. Ross*, 69 L. J. Ch. 363 ; [1900] 1 Ch. 788.

Distress by mortgagor after appointment of receiver.

In the absence of an express contract erroneous payments made by a receiver to the first mortgagee, cannot be taken in reduction of the mortgage debt, but must be recovered by separate action. *Law v. Glenn*, (1867) 2 Ch. 634.

Erroneous payments to first mortgagee.

The receiver is entitled to charge a commission and, if directed in writing by the mortgagee, to insure.

C. A. 1881, s. 24 :—(8.) The receiver shall apply all money received by him as follows (namely) :—

(i.) In discharge of all rents, taxes, rates, and out-

goings whatever affecting the mortgaged property ; and

- (ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver ; and
- (iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee ; and
- (iv.) In payment of the interest accruing due in receipt of any principal money due under the mortgage and shall pay the residue of the money received by him to the person who but for the possession of the receiver would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

Receiver
over lands
abroad.

The Court can appoint receivers over property out of the jurisdiction. This power is based upon the doctrine that the Court acts *in personam*. The Court does not, and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made, who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign country. See *Keys v. Keys*, (1839) 1 B. 425, where special directions were given to a receiver as to the best mode of getting in an Indian debt, and *Smith v. Smith*, (1853) 10 H. App. lxxi, where it was pointed

out that a receiver of property in Jersey and in France, would have to recover possession according to the laws of those countries ; and in *Houlditch v. Marquis of Donegal*, (1834) 8 Bli. (N. S.) 301, the House of Lords held that the Court of Chancery in Ireland ought to appoint a receiver in a suit instituted to carry into effect a decree of the Court of Chancery in England, by which a receiver had been appointed over estates in Ireland. In other words, the receiver is not put in possession of foreign property by the mere order of the Court. Something else has to be done, and until that has been done in accordance with the foreign law, any person, not a party to the suit, who takes proceedings in the foreign country, is not guilty of a contempt. *Maudsley v. Maudsley, Sons & Field*, 69 L. J. Ch. 347 ; [1900] 1 Ch. 602.

CHAPTER X.

SALE.

15 & 16
Vict. c. 86,
s. 48.

By the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 48, the Court of Chancery was, for the first time, authorized by statute to direct a sale of mortgaged property, instead of a foreclosure of the equity of redemption.

Convey-
ancing
Act, 1881,
s. 25.

This section is now-repealed and replaced by sect. 25 of the Conveyancing Act, 1881, which provides as follows:—

“(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

“(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

“(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court

may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and it may give such directions as it thinks fit respecting the costs of the defendants or any of them.

“(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrances.

“(5.) This section applies to actions brought either before or after the commencement of this Act.

“(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed. (15 & 16 Vict. c. 86, s. 48.)

“(7.) This section does not extend to Ireland.”

A sale is not to be ordered as a matter of course; it is within the discretion of the Court. *Heath v. Crealock* (1874) 44 L. J. Ch. 157; 10 Ch. 22.

Sale within the discretion of the Court.

Possession of a power of sale is not necessarily a ground of refusal of an application by a mortgagee for a sale by the Court. *Hutton v. Sealey*, (1858) 27 L. J. Ch. 263; 4 Jur. N. S. 450.

The following circumstances have been held sufficient to justify the Court in ordering a sale:—

Grounds for ordering a sale.

- (i.) Complicated interests and a sale under the Court for that reason convenient. *Hiorns v. Holton*, (1852) 16 Jur. 1077; *Wickham v. Nicholson*, (1854) 19 B. 38.
- (ii.) Mortgagor bankrupt and several incumbrances. *Cator v. Reeves*, (1852) 9 H. App. liii, n.
- (iii.) The property wholly unproductive. *Foster v. Harvey* (2), (1863) 4 D. J. & S. 59.
- (iv.) Interest in arrear. *Philips v. Gutteridge*, (1859) 4 D. & J. 531; *Smith v. Robinson*, (1853) 22 L. J. Ch. 482; 1 Sm. & G. 140.

Imme-
diate sale.

Usually, the sale is ordered only after default of payment for six months, but there is power to order immediate sale in a proper case, as when the defendants are infants, and an immediate sale is shown to be for their advantage. *Mears v. Best*, (1853) 10 H. App. li; *Siffken v. Davis*, (1853) Kay, App. xxi. For sale of infants' property, see p. 282.

Sale
refused.

Sale has been refused on the ground that :—

- (i.) It would have been oppressive. *Hopkinson v. Miers*, (1889) 34 Sol. J. 128.
- (ii.) The property would not, on a sale, realize its value, and that a sale would be very injurious to the mortgagor and later incumbrancers. *Hurst v. Hurst*, (1852) 22 L. J. Ch. 538; 16 B. 372.
- (iii.) The Court could not complete the sale by handing to the purchasers the title deeds. *Heath v. Crealock*, *supra*.

On appli-
cation of
equitable
mort-
gagee.

A sale may be ordered on the application of an equitable mortgagee by a deposit of deeds, without either memorandum of charge or agreement to execute a legal mortgage. *Oldham v. Stringer*, W. N. (1884) 235; 33 W. R. 251.

When at the trial of a foreclosure action the plaintiff asks for a sale of the property, and the mortgagor does not appear, the Court will order an account of what is due to the plaintiff to be first taken, and then so much of the property to be sold as will be sufficient to satisfy what is found due to the plaintiff. *Wade v. Wilson*, (1882) 52 L. J. Ch. 399; 22 C. D. 235.

Of mort-
gagor.

Sale may be granted on the application of the mortgagor, even in opposition to a first mortgagee, on production of evidence as to value, and that the sale will probably not be abortive. *Woolley v. Colman*, (1882) 51 L. J. Ch. 854; 21 C. D. 169.

In the absence of evidence that the property is of

sufficient value to cover the first mortgage, a sale instead of foreclosure will not be ordered on the application of subsequent incumbrancers against the wish of the first mortgagee, who asks for a sale. *Merchant Banking Co. v. London and Hanseatic Bank*, 55 L. J. Ch. 478; W. N. (1886) 5; *Smithett v. Hesketh*, (1890) 59 L. J. Ch. 567; 44 C. D. 161; *Provident Clerks' Mutual Life Assurance v. Lewis*, 62 L. J. Ch. 89; W. N. [1892] 164.

As to the conduct of the sale, there is no general rule. Conduct of sale.
The conduct will be given to whoever has most interest in getting the largest price and most power to do so, rather than to a party who is only interested in obtaining sufficient to cover his security. *Woolley v. Colman*, *supra*; *Christy v. Van Tromp*, W. N. (1886) 111; *Manchester and Salford Bank v. Scowcroft*, (1883) 27 Sol. J. 517. In some cases the mortgagor would be the most suitable person to conduct the sale. *Brewer v. Square*, 61 L. J. Ch. 516; [1892] 2 Ch. 111.

The first mortgagees, valuing the security at little more than their loan, claimed absolute foreclosure against all subsequent mortgagees. A fourth mortgagee valuing the property considerably higher, demanded the sale and the conduct of the sale. The fourth mortgagee's claim was allowed on condition that he paid into Court 10 per cent. on his valuation to guarantee the first mortgagee against loss. *Norman v. Beaumont*, [1893] W. N. 45.

A person with the conduct of a sale is in the same position as an ordinary vendor. A sale by him is not vitiated by the fraudulent bidding of other parties to the suit. *Union Bank v. Munster*, (1887) 57 L. J. Ch. 124; 37 C. D. 51.

In a partition action a sale of the whole property was refused to a tenant in common, who had mortgaged his share to the other tenant in common. In this case the Mortgagor of share.

mortgagee objected to a sale. *Gibbs v. Haydon*, (1882) 30 W. R. 726.

The Court
can sell
after
decree nisi
for fore-
closure
and re-
demption.

The power given by the Conveyancing Act, 1881, s. 25, is more extensive than that given by 15 & 16 Vict. c. 86, s. 48, the words "instead of a foreclosure" being omitted from the later statute. The Court can now direct a sale at any time before decree absolute of foreclosure (*Union Bank of London v. Ingram*, (1882) 51 L. J. Ch. 508; 20 C. D. 463; *Weston v. Davidson*, W. N. (1882) 28), and on interlocutory application. *Woolley v. Colman*, *supra*.

Form of
order.

In *Cumberland and Union Banking Co. v. Maryport Hematite Iron and Steel Co.*, 61 L. J. Ch. 335; [1892] 1 Ch. 92, an action of foreclosure, the order was that the property should be sold by the plaintiffs out of Court, the reserved biddings and the remuneration of the auctioneer to be fixed by the judge, and the proceeds of sale to be paid into Court by the plaintiffs. The order was prefaced, as required by rule 1a of Ord. LI., with a declaration that the Court was satisfied by the evidence that all persons interested in the estate to be sold were before the Court.

Costs of
first mort-
gagee.

The first mortgagee has a first claim, for his costs of a sale or abortive sale, on a sum paid into Court as security under this section (*Corsellis v. Patman*, (1867) 4 Eq. 156), and on the balance of the purchase-money after payment of his principal and interest. *Cook v. Hart*, (1871) 41 L. J. Ch. 143; 12 Eq. 459.

Security
from
mort-
gagor.

Security may be required from a mortgagor obtaining the conduct of a sale in opposition to a prior mortgagee, if the circumstances show that the mortgagee may be injured, 150*l.* was fixed in *Woolley v. Colman*, *supra*; none in *Davies v. Wright*, (1886) 32 C. D. 220; 100*l.* in *Brewer v. Square*, *supra*.

Convey-
ancing
Act, s. 70.

Section 70 of the Conveyancing and Law of Property Act, 1881, sub-s. 1, provides:—An order of the Court

under any statutory or other jurisdiction shall not, against a purchaser, be invalidated on the ground of want of jurisdiction or of want of any concurrence, consent, notice or service, whether the purchaser has notice of any such want or not.

This section does not make an order of the Court binding on a person who was not a party to the action, such as a puisne mortgagee whom the Court did not intend to affect. Such an incumbrancer cannot by virtue of this section be deprived of his property in proceedings of which he had no notice. *Jones v. Barnett*, [1900] 1 Ch. 370, distinguishing *Mostyn v. Mostyn*, [1893] 3 Ch. 376.

The sale will be made either subject to the incumbrances of such of the incumbrancers as do not consent to the sale, or a deposit will be paid into Court under sect. 5 of the Conveyancing Act to meet their charges.

Incumbrancers.

The sale will be either as formerly, under the Court, or by proceedings altogether out of Court. Ord. LI. r. 1a, R. S. C. *Cumberland Union Banking Co. v. Maryport*, 61 L. J. Ch. 335; [1892] 1 Ch. 92.

When an order for sale was made at the request of the second mortgagee, foreclosure was decreed in case a sale should not be effected. *Saul v. Pattinson*, (1886) 55 L. J. Ch. 831.

Foreclosure in default of sale.

When a mortgage debt is payable by instalments with interest, the mortgagor cannot compel the mortgagee to receive payment otherwise than by the instalments provided for by the deed. But if the mortgagee takes steps to realize his security by sale or foreclosure, then the Court will hold him only entitled to payment off of principal and interest down to the date of receipt of the mortgage money. This principle has been applied, not only to cases where the mortgagee has taken the initiative in realizing his security, but also to a case where goods subject to a bill

Sale of security for debt payable by instalments.

of sale were taken in execution and sold by the sheriff under Ord. LVII. r. 12. *West v. Diprose*, 69 L. J. Ch. 169; [1900] 1 Ch. 337.

In spite of the words in sect. 48, "may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit," the Court does not, unless there are special circumstances, as in *West v. Diprose*, direct a sale where the effect of the sale would be to alter the terms of the contract between the mortgagor and the mortgagee. *Forster v. Clowser*, 66 L. J. Q. B. 693; [1897] 2 Q. B. 362.

Bidding
by mort-
gagee.

Neither the mortgagee nor his solicitor can bid at a sale under the Court without leave. *Whitcombe v. Minchin*, (1820) 5 Madd. 91.

Leave not
given.

Leave will not be given if, under the circumstances, the bidding of the mortgagee will have an injurious effect on the sale. *Tennant v. Trenchard*, (1869) 38 L. J. Ch. 661; 4 Ch. 537.

Purchase
when no
leave to
bid given.

If a mortgagee, not having leave to bid, purchase at such a sale, the property may be ordered to be put up for sale again, and the mortgagee held to his purchase if the property fetches less than he gave, or the sale to him be annulled if a greater price be realized (*Sidny v. Ranger*, 12 S. 118); or the purchase may be set aside and redemption ordered. It would seem that the disability of a mortgagee or his solicitor is the same on a sale under a decree of the Court as on a sale under a power. *Martinson v. Clowes*, (1882) 51 L. J. Ch. 594; 21 C. D. 157; *Farrar v. Farrars, Ltd.*, (1888) 58 L. J. Ch. 185; 40 C. D. 395.

Express
power of
sale.

A power of sale in a mortgage deed is nothing but an authority to defeat the equity of redemption, and when a mortgagee sells, he conveys the legal estate not by means of a power, but by virtue of his legal ownership. *In re Harwood*, (1887) 35 C. D. 470.

The power of sale relates only to the equity of

redemption. It is called a power, because where it exists it enables the mortgagee to confer on the purchaser a larger estate in equity than he himself possesses, and it excludes the mortgagor from all equitable right against the property sold. *In re Morritt*, (1886) 56 L. J. Q. B. 139; 18 Q. B. D. 222.

In a mortgage of real or personal property by deed a statutory power of sale is incorporated by the Conveyancing Act, 1881, s. 19, but as to movable chattels subject to the provisions of the Bills of Sale Acts, there is an implied power of sale in a mortgagee of (1) movable chattels, of which he has taken possession, upon default by the mortgagor, and after reasonable notice to him; such a mortgagee is in no worse a position than a pledgee; (2) stocks and shares of fluctuating value.

“If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest, without any authority from the mortgagor, and without commencing an action of foreclosure.” Robbins on Mortgages, p. 275.

Implied
power of
sale.

Where no certain time for payment has been originally fixed, then before the power of sale can be exercised the mortgagor must have such notice as will give him a reasonable time to pay the money, and default must be made in payment after such notice. *Deverges v. Sandeman*, [1901] 1 Ch. 70; 71 L. J. Ch. 328; [1902] 1 Ch. 579.

Time of
sale.

The express power of sale given by the Conveyancing Act, 1881, s. 19, has no special statutory force, but is operative to the same extent as if it had been in terms conferred by the mortgage deed, but no further, and would presumably exclude an implied power of sale in a mortgage by deed. Sub-sect. 1; *In re Hodson and Howe's Contract*, (1887) 35 C. D. 668.

Of power
given by
Convey-
ancing
Act, s. 19,
to mort-
gagees.

Powers
incident
to estate
or interest
of mort-
gagee.

The Conveyancing Act, 1881:—"19.—(1.) A mortgagee, where the mortgage is made by deed shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) :—

"(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title or evidence of title, or other matter as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and . . .

"(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

"(3) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

"(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

"20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

Regula-
tion of
exercise

- “(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
- “(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
- “(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

“21.—(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

“(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

of power
of sale.

Convey-
ance, re-
ceipt, &c.
on sale.

“(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

“(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

“(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

“(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

“(7.) At any time after the power of sale conferred by this Act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Mort-
gagee's

“22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the

power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

receipts,
dis-
charges,
&c.

“(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.”

A more stringent form of sale may be used; as a power to sell without notice, or when no interest is in arrear; but if the mortgagee is solicitor to the mortgagor, or in any other way in a fiduciary relation to him, the onus would be on him to show that the mortgagor, after full explanation, consented to the insertion of the stringent power. *Cockburn v. Edwards*, (1881) 51 L. J. Ch. 46; 18 C. D. 449.

Stringent
form of
sale.

The power of sale given by the Act can be exercised by an attorney authorized to sell the property held by his principal, as mortgagee, but the words of sub-s. 4 of s. 21 do not authorize a sale by a person, who as an agent has power to give a receipt and discharge. These words apply to persons who are either mortgagees or have vested in them by devolution, the property of the mortgagees, such as the executors. *Dowsons and Jenkins' Contract, In re*, 73 L. J. Ch. 684; [1904] 2 Ch. 219.

Sale by
power of
attorney.

The power of sale given by the Act extends to real estate and to personal estate of every description, unless

Extent of
power of
sale in the
Act.

the provisions of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 48), are so inconsistent with the Act as to negative the incorporation of the power of sale given by the Act in a mortgage of chattels, which pass by delivery. *Ex parte Official Receiver, In re Morritt*, (1886) 56 L. J. Q. B. 139; 18 Q. B. D. 222.

Lord
Cran-
worth's
Act.

Under Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 15), an equitable mortgagee by deed of leaseholds, by way of underlease, could sell the lease. *Hiatt v. Hillman*, (1871) 19 W. R. 694.

This section was repealed by sect. 71 of the Conveyancing Act, 1881, but not as to any instrument prior to that Act.

Present
state of
law.

The present power is to sell not "the estate and interest therein, which the person who created the charge had power to dispose of," as in the earlier Act, but "the estate and interest subject to the mortgage."

An equitable mortgagee in fee, by deed executed since the Conveyancing Act, cannot convey the legal estate vested in the mortgagor. *Hodson and Howe's Contract*, (1887) 35 C. D. 668 (*secus*, where the mortgage deed was executed before the Act); *Solomon and Meagher's Contract*, (1889) 58 L. J. Ch. 339; 40 C. D. 508.

Power to
sanction
sale of
land or
minerals
separ-
ately.

The Trustee Act, 1893, sect. 44, as amended by the Amendment Act, 1894 (57 Vict. c. 10), sect. 3, enacts that where a mortgagee is authorized to dispose of land by way of sale, the High Court may sanction a sale of the land with an exception or reservation of the minerals, or a sale of the minerals separately from the residue of the land.

A petition under the above section should not be heard *ex parte*, but should be served on the mortgagor. *In re Hirst's Mortgage*, (1890) 45 C. D. 263.

The improper exercise of a power of sale subjects a mortgagee to a claim for damages.

Damages are given for any fraudulent dealing in the sale, or for any unauthorized, improper, or irregular sale (Conveyancing Act, 1881, s. 21, sub-s. (2)); as selling before the time fixed (*Brierley v. Kendall*, (1852) 17 Q. B. N. S. 937); without proper notice (*Selwyn v. Garfit*, (1888) 57 L. J. Ch. 609; 38 C. D. 273); when nothing was due (*Dicker v. Angerstein*, (1876) 45 L. J. Ch. 754; 3 C. D. 600); after demand by an agent of the mortgagee for payment, without allowing time to the mortgagor to verify the agency (*Moore v. Shelley*, (1888) 52 L. J. P. C. 35; 8 A. C. 285); after demand at the mortgagor's place of business as provided in the mortgage deed, but in the mortgagor's absence, and without giving a reasonable opportunity to hear of the demand or comply with it. *Massey v. Sladen*, (1868) 38 L. J. Ex. 34; 4 Ex. 13.

Fraud or unauthorized exercise of power.

All assigns of the mortgagor are entitled to damages if injured; for instance, second mortgagees, for a sale by the first mortgagee without notice to them, when the mortgage deed contained a proviso that notice should be given before sale to the mortgagor or his assigns, and the first mortgagee had notice of the second mortgage. *Hoole v. Smith*, (1881) 50 L. J. Ch. 576; 17 C. D. 434.

Claim for damages extends to assignees.

It would seem that in every case in which a mortgagor can set aside a sale, he may also, as an alternative, have his remedy in damages against the mortgagee.

A mortgage is chargeable not only for what the property actually produced, but also for the additional sum (if any) which it might have produced if the mortgagee had used due care and diligence. *National Bank of Australasia v. United Co.*, (1879) 4 A. C. 391; *Marriott v. The Anchor Reversionary Co.*, (1860) 30 L. J. Ch. 571; 3 D. F. & J. 177.

Negligence.

Negligence may be inferred from misdescriptions in the

conditions of sale of the rent (*Wolff v. Vanderzee*, (1869) 20 L. T. N. S. 353), or of the state of the property. *Tomlin v. Luce*, (1889) 59 L. J. Ch. 164; 43 C. D. 191.

It has been held that there is no negligence in taking a cheque instead of cash from an apparently solvent bidder (*Farrer v. Lacy, Hartland & Co.*, (1883) 55 L. J. Ch. 149; 25 C. D. 636; 31 C. D. 42), or in concurring in a sale with other mortgagees of other interests in the mortgaged property. *Cooper and Allen's Contract*, (1876) 4 C. D. 802.

Nor is it negligent to allow the purchase-money on a sale to remain on mortgage of the property at the mortgagee's risk, the full amount being credited to the mortgagor, in a case where there is no surplus due to him. *Davey v. Durrant*, (1857) 26 L. J. Ch. 830; 1 De G. & J. 535; *Thurlow v. Mackeson*, (1868) 38 L. J. Q. B. 57; L. R. 4 Q. B. 97.

Negligence in not procuring an adequate amount is matter for special proof. Negligence in not receiving the proceeds can, where the mortgagee has been in possession, be inquired into under the usual wilful default account. *Mayer v. Murray*, (1878) 47 L. J. Ch. 605; 8 C. D. 424.

Injury to
mort-
gagor.

If a sale has been made *bonâ fide* for the purpose of realizing the security, the mere fact that the mortgagor has suffered injury does not entitle him to damages. *Adams v. Scott*, (1858) 7 W. R. 213; *Warner v. Jacob*, (1882) 51 L. J. Ch. 642; 20 C. D. 220.

A mortgagee selling under a power of sale is not a trustee for the mortgagor. If a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Wilful and reckless dealing with the property

in such a way that the interests of the mortgagor are sacrificed, shows that the mortgagee had not been exercising his power of sale in good faith. A sale, otherwise good, cannot be impeached because made to a co-owner of the mortgagor or to the mortgagee's solicitor. *Kennedy v. De Trafford*, 65 L. J. Ch. 465; [1897] A. C. 180; *Nutt v. Easton*, 68 L. J. Ch. 367; [1899] 1 Ch. 873.

A sale can be set aside for fraud to which the purchaser is privy, and also—

Sale set aside.

- (1.) For gross undervalue, so great as to be evidence of fraud. *Davey v. Durrant*, *supra*. Gross under-value.
- (2.) If the transaction is merely nominal as when a mortgagee sells to himself or to a partnership of which he is a member, or to an agent for himself (*Martinson v. Clowes*, (1882) 51 L. J. Ch. 594; 21 C. D. 857); *Ex parte Lacey*, (1802) 6 Ves. 625; *Whitcomb v. Minchin*, (1820) 5 Madd. 91. Purchase by mortgagee.

Sale to a corporation or limited company of which the mortgagee is a member cannot, on that ground, be set aside, but the burden of sustaining the transaction as an honest one may be cast upon the purchaser. *Farrar v. Farrars, Limited*, (1888) 58 L. J. Ch. 183; 40 C. D. 395.

At a sale by auction under the direction of a building society as mortgagees, the secretary of the society openly bid for and became the purchaser of two lots on his own account. There was no proof of undervalue, but it was held that under the circumstances the sale to the secretary could not be maintained as against the mortgagor. A sale has been set aside when an active member of the committee of a building society who were selling as mortgagees purchased on his own account. *Martinson v. Clowes*, *supra*; *Hodson v. Deans*, 72 L. J. Ch. 751; [1903] 2 Ch. 647.

Irregularity to knowledge of purchaser.

- (3.) When there is an irregularity of which the purchaser has notice ; for instance, after a tender in his presence. *Jenkins v. Jones*, (1860) 29 L. J. Ch. 498 ; 2 Giff. 99.

The Conveyancing Act, 1881, s. 21 (2), and similar provisoes in mortgage deeds relieving a purchaser from inquiring into the regularity of a sale, do not protect a purchaser who knew of the irregularity. *Parkinson v. Hanbury*, (1860) 1 Dr. & S. 147 ; *Selwyn v. Garfit*, (1888) 57 L. J. Ch. 609 ; 38 C. D. 273.

Waiver of irregularity.

Unless, perhaps, the irregularity is one which the mortgagor could waive, and the purchaser does not know that there has been no waiver. *In re Thompson and Holt*, (1890) 59 L. J. Ch. 651 ; 44 C. D. 492.

As between purchaser and mortgagor.

Under a similar proviso, a sale if made to a *bonâ fide* purchaser without notice is valid, though improper ; as, for instance, after satisfaction of the debt. *Dicker v. Angerstein*, (1876) 45 L. J. Ch. 754 ; 3 C. D. 600.

Between purchaser and mortgagee selling.

The true construction of ss. 19, 20, 21 (2) of the Conveyancing Act is to protect a purchaser who has obtained a conveyance without any notice of any impropriety or irregularity in the exercise of the power of sale. The vendor is bound to show, on the request of the purchaser, that the power is exercisable. *Life Interest, &c., Securities Corporation v. Hand-in-Hand, &c., Insurance Society*, (1898) 67 L. J. Ch. 548 ; [1898] 2 Ch. 230.

Puise mortgagee may bid.

A subsequent mortgagee, who does not have the conduct of the sale, and derives no unfair advantage from his position as mortgagee, can buy from the first mortgagee and obtain an irredeemable title. *Shaw v. Bunny*, (1864) 33 B. 494 ; on appeal, 2 D. J. & S. 474 ; 34 L. J. Ch. 257.

Disability of mortgagee.

The disability of the mortgagee to purchase only arises when he is seller.

A debtor covenanted to convey property, when required,

to his creditor upon trust to sell. He did not convey, and was not requested to convey. The creditor agreed with an agent of the debtor to purchase the property, and obtained specific performance. *Chambers v. Waters*, 3 S. 42; on appeal, *Waters v. Groom*, (1844) 11 Cl. & F. 684.

So far as regards a mortgagee's liabilities, it is immaterial whether the sale is under a trust for sale, or a power of sale. *Cooper and Allen's Contract*, (1876) 46 L. J. Ch. 183; 4 C. D. 802. Trust or power.

Where the power of sale is by the mortgage deed made subject to a proviso that notice should be given to the mortgagor or his assigns, the first mortgagee is liable in damages if he sells without notice to a second mortgagee; and, *semble*, also to every mortgagee of whom he has notice. *Hoole v. Smith*, (1881) 50 L. J. Ch. 576; 17 C. D. 484. Notice to puisne mortgagee.

An injunction will be granted to restrain a sale at a time and in a manner contrary to the terms of the power. *Gill v. Newton*, (1866) 12 Jur. N. S. 220. Unless, by express proviso in the deed, the mortgagor's remedy is limited to damages. *Prichard v. Wilson*, (1864) 10 Jur. N. S. 330. Injunction.

Hardship upon the mortgagor is no ground for an injunction or damages against a mortgagee selling under his power, as where a property worth 20,000*l.* realizes on a forced sale 12,000*l.* *Adams v. Scott*, (1859) 7 W. R. 213. Hardship upon mortgagor.

A mortgagee selling is not a trustee for the mortgagor, even if the mortgage is in the form of a trust for sale. *Cholmondeley v. Clinton*, (1820) 2 J. & W. 1; *Downes v. Grazebrook*, (1817) 3 Mer. 200; *Robertson v. Morris*, (1858) 1 Giff. 421. Mortgagee not a trustee.

As regards the property comprised in the mortgage, a mortgagee selling is in effect a trustee for the mortgagor, *e.g.*, if the mortgaged property were a life estate, a

mortgagee selling would be liable to the mortgagor if he refused to join with the reversioner in selling the property in one lot, assuming that such a sale was the most beneficial manner of realizing the property. *Cooper and Allen's Contract, supra.*

A mortgagee exercising his power of sale *bonâ fide* for the purpose of realizing his debt, and without collusion with the purchaser, will not be restrained by the Court, even though the sale be very disadvantageous, unless the price is so low as to be itself evidence of fraud. *Warner v. Jacob*, (1882) 51 L. J. Ch. 642; 20 C. D. 220; *Kennedy v. De Trafford*, *Nutt v. Easton, supra.*

Each case must depend on its own ground. Spite against the mortgagor is not of itself sufficient ground for restraining a mortgagee from exercising a power of sale; that is, if a mortgagee keeps within his legal rights, his motive for exercising them is immaterial. *Nash v. Eads*, (1880) 25 Sol. J. 95; *Colson v. Williams*, (1889) 58 L. J. Ch. 589.

Sum to be
paid into
Court.

In order to restrain a mortgagee from selling, in the absence of fraud, it is not sufficient to contest the amount due on the mortgage. The mortgagor must pay into Court or tender to the mortgagee, the amount claimed to be due. *Matthie v. Edwards*, (1846) 16 L. J. Ch. 405; *Hill v. Kirkwood*, (1880) 28 W. R. 358; *Macleod v. Jones*, (1888) 53 L. J. Ch. 534; 24 C. D. 289; *Deverges v. Sandeman, Clark & Co.*, 71 L. J. Ch. 328; [1902] 1 Ch. 579; unless:—

- (1.) The terms of the mortgage deed show that a less sum is due. *Hickson v. Darlow*, (1883) 23 C. D. 690.
- (2.) A fiduciary relation exists between mortgagor and mortgagee. *Macleod v. Jones, supra.*

In other words, if there is a *bonâ fide* dispute as to the

amount due, the word of the mortgagee must, for the purpose of the injunction, be taken as conclusive.

Where a second mortgagee brought an action to restrain a sale by the first mortgagee, the Court refused an interlocutory injunction, as the purchaser was not a party. *Butters v. Mellor*, (1890) 34 Sol. J. 564.

A mortgagor in one case indirectly restrained a sale and obtained an extension of time. He issued an originating summons against the mortgagee threatening to sell, asking for an order for sale under sect. 25 of the Conveyancing Act, 1881, and obtained the conduct of the sale. *Brewer v. Square*, 61 L. J. Ch. 516; [1892] 2 Ch. 111.

Sales have been restrained pending a redemption action made necessary by a refusal to accept payment (*Rhodes v. Buckland*, (1852) 16 B. 212); after a tender made (*Jenkins v. Jones*, (1860) 29 L. J. Ch. 493; 2 Giff. 99); after a threat to sell unless the mortgagor paid another sum not chargeable against him. *Whitworth v. Rhodes*, (1850) 20 L. J. Ch. 104.

Instances
of injunction.

A power of sale is *primâ facie* not transferable. In order that it may be transferred the deed must show an intention that it should be transferable as by the use of the word "assigns" or by a provision that the power of sale may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage-money. *Rumney v. Smith*, 66 L. J. Ch. 641; [1897] 2 Ch. 351.

Transfer
of power
of sale.

An action to redeem the mortgage does not suspend a power of sale. *Matthie v. Edwards*, *supra*.

Power not
suspended
by re-
demption
action.

The question as to what circumstances may cause a suspension or extinguishment of a power of sale seems not free from doubt:—

Suspension
of
power of
sale.

- (i.) After foreclosure absolute, the extinction of a power of sale seems a question of fact. If there is any

prospect that any part of the equity of redemption still survives, the mortgagee should be assumed to have retained his power, so that he may convey to a purchaser an absolute title free from any defects in the foreclosure decree.

(ii.) After obtaining an order *nisi*, a mortgagee cannot sell before the day fixed for payment, because a sale would preclude him from obeying the order to reconvey on payment. The proper course, in such a case, would be to enter into a conditional contract for sale. An order *nisi* does not extinguish a mortgagee's power of sale, but he can only exercise it by leave of the Court, and after judgment the mortgagee cannot dismiss his action. *Stevens v. Theatres Ltd.*, 72 L. J. Ch. 764; [1903] 1 Ch. 857.

(iii.) During a sub-mortgage, the power of sale, so far as regards the original mortgagee, is suspended, but is apparently exercisable by the sub-mortgagee. *Cruse v. Nowell*, (1856) 2 Jur. N. S. 586; 25 L. J. (Ch.) 709.

(iv.) An absolute title under the Statutes of Limitation does not extinguish a power of sale in a mortgagee, who can still sell under his power, and thus preclude all questions on the statute. *In re Alison, Johnson v. Mounsey*, (1879) 11 C. D. 284.

An improper exercise of a power of sale is inoperative but is not necessarily a fraud or evidence of fraud. It does not extinguish the power which is still exercisable on a subsequent proper occasion. *Henderson v. Astwood*, [1894] A. C. 150.

Mortgagee
selling a
trustee of
surplus.

A mortgagee having a power of sale and having executed it is, in respect of the surplus, a trustee or in the nature of a trustee. He holds this surplus for the benefit of the

second mortgagee if there is one, or if not, of the mortgagor. In this respect there is no difference between a power of sale and a trust for sale, if the trust for sale is merely a mortgage transaction. In the case of a constructive trustee, no trust can arise until it is shown that there is a surplus, and after six years have expired from the time when the money was received by the mortgagee, evidence would be inadmissible to raise a case of constructive trust unless there had been an acknowledgment of the mortgagor's title or of there being any surplus. The words of the Conveyancing Act, 1881, s. 21, sub-s. (3), "in trust," seem to make a mortgagee selling under the Act an express trustee of the surplus. In this case he could not plead the Statute of Limitations except in accordance with the Trustee Act, 1888, s. 8. *Dobson v. Land*, (1850) 19 L. J. Ch. 484; 8 H. 220; *Banner v. Berridge*, (1881) 50 L. J. Ch. 680; 18 C. D. 254; *In re Bell, Lake v. Bell*, (1886) 56 L. J. Ch. 307; 34 C. D. 462; *Charles v. Jones*, (1887) 56 L. J. Ch. 745; 35 C. D. 544; *Thorne v. Heard*, 64 L. J. Ch. 652; [1895] A. C. 495.

It seems open to doubt whether the Conveyancing Act makes a mortgagee an express trustee of anything except an acknowledged or ascertained balance. If this is so, then if a mortgagee acknowledges a definite sum as a balance, it would not be possible after six years, to initiate proceedings to show that the balance was larger.

A mortgagee, in doubt as to who is entitled, may pay the surplus proceeds of a sale into Court under the Trustee Relief Act (12 & 13 Vict. c. 74). *Walhampton's Estate*, (1844) 53 L. J. Ch. 1000; 26 C. D. 391.

Surplus
proceeds
paid into
Court.

Interest at four per cent. from the time of the completion of the sale will be charged against the mortgagee on any surplus after payment of debt and costs, unless the surplus has been either paid into Court or invested

so as to bear interest for those entitled. *Charles v. Jones, supra.*

A mortgagee paying the surplus of the mortgaged security to the mortgagor obtains no release as against a puisne mortgagee of whose mortgage he had notice. *West London Commercial Bank v. Reliance Permanent Building Society*, (1885) 54 L. J. Ch. 1081 ; 29 C. D. 954.

Devolu-
tion of
surplus
proceeds.

The amount of the surplus proceeds paid to the mortgagor is when it reaches his hands, personal property. But, if the mortgaged property is sold after his death, the money descends in the same way as the mortgaged property would, if unsold, have descended, *e.g.*, if the land of a mortgagor dying intestate has been sold, the proceeds belong to the heir, subject to the dower of the widow. *Wright v. Rose*, (1825) 2 S. & S. 323 ; *Bourne v. Bourne*, (1842) 11 L. J. Ch. 416 ; 2 H. 85 ; *Jones v. Jones*, (1858) 4 K. & J. 361.

Widow's
dower.

The widow's dower can be secured by an investment of the balance and payment of one-third of the income to her for her life, or under the sanction of the Court, if one of the parties is under disability, the fund may be divided between the heir and widow, the value of the dower being ascertained by actuarial calculations. *In re Hall's Estate*, (1880) 39 L. J. Ch. 392 ; 9 Eq. 179.

The agreement in the mortgage deed for reconveyance when the debt is paid off, and the trust of the surplus money on a sale, ought to be both in accordance with the title prior to the mortgage ; sometimes, mortgage deeds introduce variations, and a question then arises whether this variation is the result of inaccurate drafting or an intention to change the beneficial interest.

For the circumstances which help to decide this question, see p. 205, and *Dawson v. Bank of Whitehaven*, (1877) 46 L. J. Ch. 884 ; 6 C. D. 218.

A direction, that the conveyance should be made to the mortgagors their heirs or assigns, and that the surplus proceeds of a sale should be paid to the mortgagors their heirs or assigns without any mention of executors or administrators, does not operate as a reconversion of the proceeds of a sale made during the lifetime of the mortgagor. *Chadwick v. Grange*, [1907] 1 Ch. 313.

If the proceeds of sale are intentionally given to some one as a new gift, the rule, that the proceeds of land sold, after the mortgagor's death go as real estate, does not apply. *Jones v. Davies*, (1878) 8 C. D. 205.

In the above case the equity of redemption was reserved to the uses prior to the mortgage; but there was a difference between that reservation and the direction as to surplus sale moneys.

From the preciseness of the provisions in the deed, and the circumstances that the prior uses were a legal settlement of land, having no reference to the investment of a money fund, it was held that the variation was intentional.

Surplus proceeds of sale of one property may be retained in payment of the debt secured on another mortgaged property, in any case where the mortgagee could have resisted the redemption of the first property except on the terms of payment of the debt on the other property. *Chesworth v. Hunt*, (1880) 49 L. J. C. P. 507; 5 C. P. D. 266.

Doctrine of consolidation applied to surplus proceeds.

A holder of a bill of sale on chattels cannot hold the proceeds of their sale in satisfaction of another debt, as against an execution creditor, the policy of the Bill of Sale Act being, that a bill of sale is to exclude an execution creditor only to the extent of the consideration therein stated. *Chesworth v. Hunt*, *supra*.

Of chattels under a bill of sale.

Surplus proceeds of the conversion of the mortgaged

Surplus proceeds

applied in
payment
of un-
secured
debts.

property, may, to avoid circuity of action, be retained by the mortgagee in payment of debts, other than mortgage debts, due to him from the mortgagor as against the mortgagor's estate when solvent. *Rolfe v. Chester*, (1855) 25 L. J. Ch. 244; 20 B. 610; *Irby v. Irby*, (1855) 22 B. 217.

When the estate is insolvent, the balance must be handed to the executor, and the mortgagee must prove with the other creditors for his debts beyond the mortgage debt. *Christison v. Bolam*, (1887) 57 L. J. Ch. 221; 36 C. D. 223, following *Talbot v. Frere*, 9 C. D. 568, and disapproving of *Spalding v. Thompson*, 26 B. 637; *Re Haselfoot*, 13 Eq. 327; *Ex parte National Bank*, 14 Eq. 507.

Set-off.

All the above cases relate to claims to retain money received in respect of a mortgaged policy on the mortgagor's life against debts outside the mortgage. There can be no set-off as against an executor between a debt accruing after the mortgagor's death as on a policy on his life and a debt due from the mortgagor. These cases are not, therefore, decisive in a case where the mortgagee has right of set-off. Ord. XIX. r. 3, R. S. C.

Proof for
deficiency.

When the proceeds of sale of the mortgaged property are insufficient to pay all principal, interest, and costs, the mortgagee can sue the mortgagor for the deficiency.

He can also prove in the bankruptcy of the mortgagor, or himself bring an administration action, or bring in a claim in an administration already commenced. *In re Talbot, King v. Chick*, (1888) 58 L. J. Ch. 70; 39 C. D. 567.

Calcula-
tion of
deficiency.

The deficiency is the amount of the principal due and so much of the interest as accrued prior to the adjudication or judgment after deducting therefrom the proceeds of sale.

Income received since the adjudication can be set off against interest accrued since that date. There can be no proof for interest accrued since the adjudication, and no portions of the proceeds of sale can be appropriated to the discharge of interest accrued since the adjudication. *Ex parte Penfold*, (1851) 4 D. G. & S. 282; *Re Savin*, (1872) 7 Ch. 760; *Re Summers*, (1879) 13 C. D. 136; *In re London, Windsor, and Greenwich Hotels Company*, 61 L. J. Ch. 273; [1892] 1 Ch. 639, dissenting from *King v. Chick*, *supra*.

Proof in
bank-
ruptcy for
interest.

CHAPTER XI.

RECONVEYANCE.

Mort-
gagee's
right.

BEFORE the Conveyancing Act, 1881, s. 15, and the Conveyancing Act, 1882, s. 12, merely a reconveyance could be required from a mortgagee on payment. Under the above sections the mortgagor or a *puisne* mortgagee has a right to have from a mortgagee who has not been in possession a transfer instead of a reconveyance. For these sections, see p. 227.

Deed of
re-con-
veyance.

A mortgagee cannot claim to have in the deed of reconveyance recitals showing the devolution of the equity of redemption since the mortgage, or object to the deed because it contains no recitals whatever, but on the other hand he cannot be required to execute a deed containing incorrect recitals. *Hartley v. Burton*, (1868) 3 Ch. 365.

The deed of reconveyance should be prepared by the mortgagor, and tendered for perusal to the mortgagee, who, in difficult cases, is entitled to have a reasonable time in which to consider if the deed is in the proper form for execution. *Wiltshire v. Smith*, (1744) 3 Atk. 89.

Duty of
mort-
gagee.

There is a duty upon a mortgagee to see that the reconveyance preserves the rights of all persons who, he knows, are interested in the equity of redemption. *Aynsley v. Reed*, (1754) 1 Dick. 249; *Pearce v. Morris*, (1869) 39 L. J. Ch. 342; 5 Ch. 227; *Alderson v. Elgey*, (1884) 26 C. D. 567.

Instances
of lia-
bility.

Three mortgagors conveyed property to a bank by way of mortgage. One of the three paid off the debt, and the

bank, without any notice to the other two, transferred the mortgaged property to purchasers from the one who had paid. The bank was held liable for the value of the mortgaged property on the ground that, receiving from three, they ought not to have reconveyed to the nominees of one, as they were unable to prove an authority, express or implied, in that one to deal with the mortgaged property. *Magnus v. Queensland National Bank*, (1888) 57 L. J. Ch. 413; 87 C. D. 466.

Mortgagees with knowledge of a *puisne* mortgage concurred with the mortgagor in conveying the property to a purchaser and allowed the mortgagor to receive the balance of the purchase-money after payment of their debt. For thus ignoring the rights of a *puisne* mortgagee they were held liable. *West London Commercial Bank v. Reliance Building Society*, (1885) 54 L. J. Ch. 1081; 29 C. D. 954.

The proviso in the mortgage deed for reconveyance of the mortgaged property on payment of the debt ought, in the absence of express instructions, to be in accordance with the title prior to the mortgage.

Proviso
for re-
demption.

Except when a tenant in tail by deed under the Fines and Recoveries Act mortgages his estate tail, in which case the reconveyance should be to him, his heirs, and assigns. Sugden, R. P. S. 199.

Tenant
in tail.

When the old limitations are displaced by the proviso for redemption all the circumstances of each case must be considered to show if the intention was merely to make a security and the alteration has been made by inadvertence, or if more than a security was intended and the alterations have been intentional. *Plomley v. Felton*, (1888) 58 L. J. P. C. 50; 14 A. C. 61.

Old title
altered by
proviso
for re-
demption.

In the absence of countervailing circumstances where there is a mortgage there is a presumption against any

alteration being intended in the title to the equity of redemption. *Plomley v. Felton, supra.*

Evidence
to show
change
due to
inad-
vertence.

Relation
of parties.

The following circumstances may show that the change was due to inadvertence, and that no more was intended than a mortgage:—

- (1) The relation of the parties, as when a wife's estate is mortgaged as security for the husband's debt or for his benefit.

In the absence of special circumstances, this presumption would not be removed by an express limitation to the husband and his heirs, or by the heirs having paid the interest on the mortgage. *Whitbread v. Smith*, (1854) 28 L. J. Ch. 611; 3 De G. M. & G. 727; *Stansfield v. Hallam*, (1859) 29 L. J. (N. S.) Ch. 178; 5 Jur. N. S. 1884.

The above reasoning hardly applies when the deed in its terms limits the equity of redemption to the husband in order that he may create further charges without the consent of the wife, and the question is on the right to create the further charges and not on the right to the ultimate equity of redemption, subject to the charges when created. *Eddleston v. Collins*, (1858) 22 L. J. Ch. 480; 3 De G. M. & G. 1.

Protection
of party
joining.

- (2) The possibility that the alteration may have been adopted in order to protect a person whose interest has been destroyed for the purpose of the mortgage.

For instance, when a wife with right of dower joined in a mortgage of her husband's estate in order to bar her dower, and the proviso for reconveyance was to the husband and wife and their heirs; it was held that the wife was enabled to redeem, but only to protect her dower, and that she did not obtain the whole estate. *Jackson v. Parker*, (1770) Amb. 687; *Dawson v. Bank of Whitehaven*, (1887) 46 L. J. Ch. 884; 6 C. D. 218.

The following circumstances may show that the alterations are intentional :—

Evidence
of altera-
tion being
intentional

- (1) An express recital to this effect.
- (2) The mortgagor obtains a more beneficial ownership. *Plomley v. Felton*, *supra*.
- (3) The mortgage was for a term and extend to the inheritance. *Innes v. Jackson*, 16 Ves. 356; *Reeves v. Hicks*, (1825) 403; *Jackson v. Innes*, (1819) 1 Bl. 1.
- (4) The persons displaced by the new use are persons who at their option might join in the mortgage, but persons entirely displaced by the mortgagor. *Anson v. Lee*, (1831) 1 Sugden on Powers, 345, 7th ed.; *Walker v. Armstrong*, (1856) 25 L. J. Ch. 402.

The rule has been stated as follows :—In cases depending merely on the reservation on the equity of redemption, variations which can reasonably be referred to mistake or inaccuracy are not to be regarded, but if the variations be such that they cannot from their nature be referred to mistake or inaccuracy, I think they must have their effect. *Per Turner, L.J.*, in *Heather v. O'Neil*, (1858) 27 L. J. Ch. 512; 2 De G. & J. 416.

Summary
of rule.

As to alterations in the beneficial interests in the surplus proceeds of sale of the mortgaged property, see p. 200.

On the death of a mortgagee, his personal representative is the person to reconvey. The Conveyancing Act, 1881, s. 30, see p. 125.

On death
of mort-
gagee.

In mortgages under powers, the proviso for redemption should recognize the right to redemption not only of the person (if any) who in the mortgage deed covenants to repay, but of those who may ultimately be interested in the land charged with the mortgage debt.

Proviso in
mortgage
under
power.

No fore-
closure or
redemp-
tion before
condition
broken.

Before the date fixed for payment and breach of the obligation to pay, the condition in the proviso for reconveyance has not been broken, and the mortgagor's right to a reconveyance rests on a legal contract. There is no equitable right of redemption and therefore no right of foreclosure. *Williams v. Morgan*, 75 L. J. Ch. 480; [1906] 1 Ch. 804.

The right
to redeem.

A mortgagee can never refuse to restore to his mortgagor, or those who claim under him, upon payment of what is due upon the mortgage, the estate which became vested in him as mortgagee. To him, it is immaterial, upon repayment of his money, whether the mortgagor's title was good or bad. *Tasker v. Small*, (1837) 3 My. & Cr. 70.

Nature of
case may
qualify
the right.

Redemption is of the very nature and essence of a mortgage. This does not mean a right in the mortgagor in every case to pay at any time his debt, and then demand immediate return of his property. When a mortgage is made to secure an annuity for the life of another, or to indemnify against contingent charges, or for any other object not capable of immediate pecuniary valuation, redemption is for the time impossible. *Fleming v. Self*, (1854) 24 L. J. Ch. 29; 3 De G. M. & G. 997.

Mortgage
cannot be
made irre-
deemable.

No agreement or stipulation between mortgagor and mortgagee can make a mortgage irredeemable. *Courtenay v. Wright*, (1860) 2 Giff. 387.

Nor can this be effected indirectly, as by limitation to a class so small that redemption will probably be impossible. *Howard v. Harris*, (1683) 1 Vern. 32.

Except,
by statute,
by a
fraudulent
mort-
gagor.

By statute, a mortgagor cannot redeem a second mortgage which he has obtained by fraudulently concealing a first mortgage. (4 & 5 W. & M. c. 16, s. 2.) *Kennard v. Futvoye*, (1860) 2 Giff. 81; 29 L. J. (N. S.) Ch. 553; *Stafford v. Selby*, (1707) 2 Vern. 589. See on this Act, p. 71.

Delay of

A provision that redemption shall be postponed for a

reasonable time, and after a fair bargain, is good. The fact that the mortgagee covenants not to call in his money for the same period, is an indication that the arrangement is reasonable. *Teevan v. Smith*, (1882) 51 L. J. Ch. 621; 20 C. D. 724; *Bradley v. Carritt*, *infra*.

redemption for a reasonable period permitted.

Postponement for thirty years was held unreasonable, and redemption allowed (*Talbot v. Braddyl*, (1688) 1 Vern. 188); and for twenty years, when the mortgagee was solicitor to the mortgagor. *Cowdry v. Day*, (1859) 29 L. J. Ch. 39; 1 Giff. 316.

The omission in the deed of mortgage of a proviso for redemption will not prevent redemption. *Bell v. Carter*, (1853) 22 L. J. Ch. 933; 17 B. 11.

Omission of proviso for redemption.

The mortgagee is not allowed at the time of the loan to enter into a contract to purchase the mortgaged property, whether the agreement be contained in the mortgage deed or in some separate document. Proof of fraud or oppression is not necessary.

Purchase by mortgagee at time of mortgage.

The reason of the rule is, that a condition making the property become an absolute purchase in the mortgagee upon any event whatsoever, "puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender." *Per* Lord Hardwicke, *Thoomes v. Consett*, (1745) 3 Atk. 261; *Samuel v. Jarrah Timber & Wood Paving Corporation*, 73 L. J. Ch. 526; [1904] A. C. 323.

Redemption during fixed period only.

Stipulations are invalid which restrict redemption, as for example, to the life of the mortgagor (*Howard v. Harris*, *supra*; *Northampton v. Pollock*, 61 L. J. Ch. 49; (1892) A. C. 1), unless the circumstances show an intention to make a present of the equity of redemption to the mortgagee after the mortgagor's death, or there is a separate and independent transaction subsequent to the

mortgage, by which the mortgagee purchases the equity of redemption. *Bonham v. Newcomb*, (1684) 1 Vern. 232; *Reeve v. Lisle*, [1902] 1 Ch. 53; 71 L. J. Ch. 768; [1902] A. C. 461.

A col-
lateral ad-
vantage.

It is impossible for the mortgagee to obtain by agreement a collateral advantage, and to clog the equity of redemption with a bye agreement in addition to interest on the loan. *Jennings v. Ward*, (1705) 2 Vern. 520; *Gossip v. Wright*, (1863) 32 L. J. Ch. 648.

Once a mortgage always a mortgage. No stipulation is valid which excludes a mortgagor upon any event or condition from recovering his property on payment of principal, interest, and costs, or prevents a mortgagor who has paid principal, interests, and costs, from getting back his mortgaged property in the condition in which he parted with it. *Noakes & Co., Ltd. v. Rice*, 71 L. J. Ch. 139; [1902] A. C. 24.

If the advantage stipulated for by the mortgagee does not extend beyond the continuance of the mortgage, it may be valid, *e.g.*, a covenant by a mortgagor to buy his beer exclusively from the mortgagee until repayment of the loan. *Biggs v. Hoddinott*, 67 L. J. Ch. 540; [1898] 2 Ch. 307.

Invalid stipulations are such as covenants by a publican during the term of his leasehold house to buy the beer consumed there exclusively from brewer mortgagees, by a proprietor of a leasehold theatre to pay the mortgagee a share of the profits during the term. *Noakes v. Rice*, *supra*; *Santley v. Wilde*, 68 L. J. Ch. 681; [1899] 2 Ch. 474.

A covenant by a shareholder in a tea company who had mortgaged his shares to a broker, that the broker should always be employed as the company's broker; and a covenant by a farmer, that he would sell his holding

within twelve months and employ the mortgagee as the auctioneer at a certain commission, are not enforceable after redemption. *Browne v. Ryan*, [1901] 2 I. R. 658; *Bradley v. Carritt*, 72 L. J. K. B. 471; [1903] A. C. 253.

The repeal of the usury laws (17 & 18 Vict. c. 90) has not affected this rule. *Broad v. Selfe*, (1863) 11 W. R. 1036; *Barrett v. Hartley*, (1866) 2 Eq. 789; *James v. Kerr*, (1889) 58 L. J. Ch. 355; 40 C. D. 449.

The following profits, secured to a mortgagee by the mortgage deed, have been disallowed :—

Instances.

- (i.) Remuneration for his personal trouble on entering into possession. *Eyre v. Hughes*, (1876) 45 L. J. Ch. 395; 2 C. D. 148.
- (ii.) Commission as auctioneer on selling the mortgaged property. *Broad v. Selfe*, *supra*.
- (iii.) Commission for management of the mortgaged property. *Barrett v. Hartley*, *supra*; *Thompson v. Rumball*, (1838) 3 Jur. 53.
- (iv.) Remuneration as receiver. *Chambers v. Goldwin*, (1801) 9 Ves. 254.

Prior to the Mortgagees Legal Costs Act, 1895, the validity of an express stipulation that a solicitor mortgagee should have profit costs was doubtful. *Re Wallis*, *Ex parte Lickorish*, (1890) 59 L. J. Q. B. 500; 25 Q. B. D. 176; *Hibbert v. Lloyd*, 62 L. J. Ch. 14; [1893] 1 Ch. 129.

Solicitor
mort-
gagee.

Such a contract was held to be invalid by Kay, J.; but in the Court of Appeal, it was held that the contract did not cover profit costs, and the question of invalidity was not considered. *Field v. Hopkins*, (1890) 59 L. J. Ch. 174; 44 C. D. 524.

In the above cases the question arose on taking accounts between mortgagee and mortgagor relating to the mort-

gaged property, they were not cases where the mortgagee had sued on his covenant.

The Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25), s. 2, permits a solicitor mortgagee to charge for all work done in completing and preparing a mortgage made after the commencement of the Act, and provides :—

Right of
solicitor
with
whom
mortgage
is made
to recover
costs, &c.

8.—(1) Any solicitor to or in whom either alone or jointly with any other person any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done or to charge against the security for all business transacted, and acts done by such solicitor or firm subsequent and in relation to such mortgage or to the security thereby created, or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive, if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts, and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration.

(2) This section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act.

As regards judgments and accounts directed before the Act, the law is not altered by the above statute. *Eyre v.*

Mackenzie, [1896] 1 Ch. 185; *Day v. Kelland*, 70 L. J. Ch. 8; [1900] 2 Ch. 745.

A condition or stipulation that if the money is not repaid in the manner or on the day prescribed a larger sum shall become due is a penalty, against which equity will relieve, and the mortgagor can redeem on payment of the lesser sum. Penalty.

But not so where there is an agreement to accept a smaller sum in lieu of a larger already due, with a proviso that if the smaller sum is not paid the original liability shall revive. *Ex parte Bennet*, (1748) 2 Atk. 527; *Davis v. Thomas*, (1830) 1 Russ. & My. 506; *Ford v. Chesterfield*, (1854) 19 B. 428; *Rose v. Rose*, (1756) Amb. 331; *Thompson v. Hudson*, (1886) 38 L. J. Ch. 431; 4 H. L. 1.

In such a case the borrower is not subjected to a new liability, but, on his default, matters are restored to their original state. *The Protector Company v. Grice*, (1880) 49 L. J. Q. B. 812; 5 Q. B. D. 121, 592.

A proviso that the money shall remain for a period, and that the mortgagee shall not, during that period, call in the money, implies that the restraint on the mortgagee will cease, if the mortgagor fails to pay the interest punctually. *Seaton v. Twyford*, (1870) 40 L. J. Ch. 122; 11 Eq. 591.

Where a mortgage debt is made payable by instalments, a provision, making the total sum enforceable on any default, is not to be considered a penalty. *Wallingford v. Mutual Society*, (1880) 50 L. J. Q. B. 49; 5 A. C. 685; *Ex parte Burden, in re Neil*, (1881) 16 C. D. 675. Debt payable by instalments.

The rule is, that if a larger sum is to be paid upon default, it is a penalty; a stipulation to pay upon default a sum not larger than the total amount is not a penalty. *Protector Loan Society v. Grice, supra*.

Reduction
of interest
on punct-
ual pay-
ment.

If interest is fixed at one rate, with a reduction to a lower rate on punctual payment, the higher rate is due if the payment of interest is not strictly punctual. *Nicholls v. Maynard*, (1747) 3 Atk. 519.

A proviso that interest at a certain rate shall be paid, but shall be increased to a higher rate if payment is unpunctual, is a penalty and invalid. *Holles v. Wyse*, (1698) 2 Vern. 289; *Strode v. Parker*, (1694) 2 Vern. 316; and see *Wallingford v. Mutual Society*, *supra*.

But a stipulation to pay in case of an unpunctual payment, interest at a higher rate or commission between the time fixed for payment and actual payment, may, under some circumstances, possibly be held good as a separate and distinctive covenant not in the nature of a penalty. *Burton v. Slattery*, (1725) 5 Bro. P. C. 233; *Hallifax v. Higgins*, (1689) 2 Vern. 134; *Herbert v. Salisbury and Yeovil Rail. Co.*, (1866) 2 Eq. 221; *General Credit and Discount Company v. Glegg*, (1883) 52 L. J. Ch. 297; 22 C. D. 549.

A right to forfeit an indulgence, given by the mortgage contract, is not waived by receipt of interest unless inconsistent with the right of forfeiture. Taking interest at a less rate may be inconsistent with the right to take interest at a larger rate; but if the right is to receive the whole sum, receipt of money for interest may be no more than taking the money in dribblets. *Keene v. Biscoe*, (1878) 47 L. J. Ch. 644; 8 C. D. 201.

Bonus.

A contract that a mortgagor shall redeem only on payment of a larger sum than the actual advance, is valid if the bonus which the mortgagee thus gets is fair and reasonable, and the mortgagor is subject to no unfair pressure:—

(i.) A bonus of 225*l.* on an advance of 100*l.* was disallowed, but there were other material circum-

stances. *James v. Kerr*, (1889) 58 L. J. Ch. 355; 40 C. D. 449.

- (ii.) A bonus of 300*l.* on an advance of 700*l.* was allowed. *Potter v. Edwards*, (1857) 26 L. J. Ch. 468.
- (iii.) Commission at various rates up to 15 per cent. on the sum advanced was allowed. *Mainland v. Upjohn*, (1889) 58 L. J. Ch. 361; 41 C. D. 126; see also *Northampton v. Pollock*, 61 L. J. Ch. 49; [1892] A. C. 1.

Other instances of loans with a bonus are :—

- (i.) When debentures are issued at a discount. *Anglo-Danubian Steam Navigation and Colliery Co.*, (1875) 44 L. J. Ch. 502; 20 Eq. 339; and
- (ii.) When a price for the accommodation of the loan is charged under the name of premium by building societies. *Re Phillips*, (1869) 27 C. D. 509.

A mortgagee can contract for compound interest in the case of a mortgage of a reversionary interest, so long as it produces no income. *Clarkson v. Henderson*, (1880) 49 L. J. Ch. 289; 14 C. D. 348.

Compound interest.

An agreement for compound interest was illegal prior to the repeal (17 & 18 Vict. c. 90) of the Usury Laws. There seems to be no case which decides how far compound interest may be inadmissible as a collateral advantage unduly clogging the equity of redemption. *Chambers v. Goldwin*, (1801) 9 Ves. 271; *Blackburn v. Warwick*, (1836) 2 Y. & C. 92; *Sackett v. Bassett*, (1819) 4 Mad. 58; *Leith v. Irvine*, (1833) 1 My. & K. 284.

Interest on interest actually in arrear may be allowed by express agreement of the mortgagor without undue pressure or extortion. An agreement to pay interest on interest in arrear was not inferred from a correspondence extending over many years between the mortgagee and mortgagor, in which the mortgagee pressed for

Interest on interest in arrear.

payment of interest, and stated that unless it were paid he should treat it as added to capital. *Tompson v. Leith*, (1858) 4 Jur. N. S. 1091; *Ashenhurst v. James*, (1745) 3 Atk. 271.

Such an agreement would ordinarily take place :—

- (a) Upon an advance of more money. *Thornhill v. Evans*, (1742) 2 Atk. 330.
- (b) On an assignment, when the arrears of interest are treated as principal and added to old principal.
- (c) On a settlement of account between mortgagor and mortgagee in possession treating interest in arrear as principal. *Wilson v. Cluer*, (1840) 9 L. J. Ch. 333; 3 B. 136.

On infants' property.

Arrears of interest and costs paid by the transferee to the mortgagee, upon the transfer of a mortgage on an infant's property cannot be converted into principal so as to bear interest. *Cottrell v. Finney*, (1874) 43 L. J. Ch. 562; 9 Ch. 541.

Compound interest.

Money actually paid for compound interest could probably not be recovered, even where its payment could not have been enforced.

Money credited in settlement is, *primâ facie*, on the same footing as money paid, but the settled account will be opened on proof that there was no intention to turn simple into compound interest.

If an account contains items with which the mortgagee admits himself chargeable in addition to those which he has received from the mortgagor, the settlement might be fairly treated as equivalent to cash; *secus*, where the account was settled on the mistaken notion that the mortgage deed allowed compound interest. *Daniell v. Sinclair*, (1881) 50 L. J. P. C. 50; 6 A. C. 181.

Unless the circumstances are peculiar a promise to pay or payments of interest on arrears of interest would not

imply a promise to pay interest on future arrears, but such a promise might be inferred from regular and continuous dealings on that footing. *Blackburn v. Warwick*, (1836) 2 Y. & C. 92; *Ferguson v. Fyffe*, (1840) 8 Cl. & F. 121.

Compound interest is directed in a judgment giving successive foreclosures. The sums which the second mortgagee pays to the first mortgagee for principal, interest, and costs is treated as one consolidated sum, and interest is allowed to the second mortgagee on it. Where the second mortgagee makes default, compound interest is also allowed to the first mortgagee from the date of the certificate made after the default, to the day of payment. *Elton v. Curteis*, (1873) 51 L. J. Ch. 60; 19 C. D. 49.

In successive foreclosures.

The part of this decision, which allows compound interest in case of default, appears to be unsupported by any of the earlier authorities, see *Bickham v. Cross*, (1752) 2 Ves. sen. 471; *Whatton v. Cradock*, (1836) 6 L. J. Ch. 178; 1 Keen, 267.

It seems a hardship to give one creditor interest upon interest to the prejudice of other creditors, where the favoured creditor has not advanced money out of pocket for the redemption of a prior incumbrancer, but the case of a mortgagor asking for further time to redeem is distinguishable. *Harris v. Harris*, (1750) 3 Atk. 722; *Brewin v. Austin*, (1838) 2 Keen, 211.

A married woman mortgagee who is not a trustee, or only a bare trustee, as after payment off of the debt, can convey the legal estate of mortgaged land without the concurrence of her husband, or acknowledgment by her under the Fines and Recoveries Act. Formerly this could not be done by a married woman who was a trustee in the ordinary sense of the word. *Harkness & Allsopp's Contract*, [1896] 2 Ch. 358; *Brook & Fremlin's Contract*, [1898] 1 Ch. 647; *West & Hardy's Contract*, [1904] 1 Ch. 145.

Reconveyance by a married woman.

Now the Married Women's Property Act, 1907 (7 Edw. 7, c. 18) provides :—

“ 1—(1) A married woman is able, without her husband, to dispose of, or to join in disposing of, real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she was a *feme sole*.

“(2) This section operates to render valid and confirm all such dispositions made after the 31st of December, 1882, whether before or after the commencement of this Act, but, where any title or right has been acquired through or with the concurrence of the husband before the commencement of this Act, that title or right shall prevail over any title or right which would otherwise be rendered valid by this section.”

Money
Lenders
Act, 1900.

Section 1 of the Money Lenders Act, 1900 (63 & 64 Vict. c. 51), provides that the Court, on any application by a money lender to enforce any agreement or security for money lent, if satisfied that the transaction is harsh or unconscionable, or is otherwise such that a Court of equity would give relief, may open the transaction, and the Court is empowered to exercise this power at the instance of the borrower, or surety, or other person liable. The same jurisdiction is given in case of bankruptcy.

Section 2. A money lender as defined by the Act must register himself as a money lender, carry on his money lending business only at his registered address, and not enter into any agreement in the course of his business as a money lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money lender, otherwise than in his registered name, and on reasonable request and on tender of a reasonable sum for expenses,

furnish the borrower with a copy of any document relating to the loan or any security therefor.

Relief may be given if the bargain is harsh and unconscionable by reason of excessive interest or other excessive charges. Two classes of cases are mentioned in the section—transactions which the Court is satisfied are “harsh and unconscionable,” and transactions which are “otherwise such that a Court of equity would give relief.” *A Debtor, in re, ex parte the Debtor*, 72 L. J. K. B. 382; [1903] 1 K. B. 705; *Wells v. Allott*, 73 L. J. K. B. 1023; [1904] 2 K. B. 842.

A person who is a money lender and omits to register himself, is under a statutory incapacity to enforce the bargain which he has made. The consequence is that whether it is the borrower or the lender who brings the matter before the Court, the transaction is absolutely void. The lender cannot compel the borrower to return the money lent. The Court has no jurisdiction to re-open, under section 1, such a transaction. *Victorian Daylesford Syndicate, Ltd. v. Dott*, 74 L. J. Ch. 673; [1905] 2 Ch. 624; *Bonnard v. Dott*, 75 L. J. Ch. 446; [1906] 1 Ch. 740.

The borrower being one of the class which the Act was presumably designed to protect can bring an equitable action to recover the securities mortgaged, but the unregistered mortgagee will not be ordered to give up to the mortgagor the securities, the subject of the mortgage, except upon the terms that the mortgagor shall repay the money which has been advanced to him. *Lodge v. National Union Investment Company, Ltd.*, [1907] 1 Ch. 300.

Where in an action by a money lender to recover money lent with interest, it appears that the interest claimed is *prima facie* excessive, the case cannot, as regards the claim for interest, be dealt with upon an application under Ord. XIV. *Wells v. Allott, supra.* Ord. XIV

CHAPTER XII.

ACTIONS OF FORECLOSURE AND REDEMPTION.

Jurisdiction over foreign mortgages.

THE Court will enforce by foreclosure an English mortgage of foreign land, for *æquitas agit in personam* but no relief by foreclosure will be given in the case of a foreign mortgage of foreign land. The Courts of equity in England are, and always have been Courts of conscience operating *in personam* and not *in rem*, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which are not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land in Scotland, in Ireland, in the colonies, and in foreign countries. *Ewing v. Orr Ewing*, (1888) 9 A. C. 40; *Norris v. Chambers*, (1861) 29 B. 246.

The Court overruled a plea of want of jurisdiction in an action for the foreclosure of the island of Sark. The Registrar's book contains an entry of plea overruled, but there is no other entry of a judgment in this action. *Toller v. Carteret*, (1705) 2 Vern. 494; Reg. lib. 1704, May 16, B. fol. 316.

There is no precedent to show in what way the Court of Chancery would enforce the foreclosure of a whole island; Lord Hardwicke decided that there was jurisdiction to foreclose a mortgage of the sovereign rights of the Isle of Man, then held by a subject. *Derby v. Atholl*, (1748) 1 Ves. 201.

Foreclosure *actio in personam*.

In an action to foreclose a mortgage of land in the island of Nevis it was held that the Court had jurisdiction,

and that foreclosure is an *actio in personam*. *Paget v. Ede*, (1874) 18 Eq. 118; *Colyer v. Finch*, (1856) 7 H. L. C. 1.

In an action against a Dutch corporation, trustees of a debenture deed and two other defendants resident in England to enforce an alleged prior equitable charge made in England, upon property and assets in Brazil, and vested in the first defendants, it was held that the first defendants were necessary and proper parties to the action within the terms of Ord. XL. r. 1 (g), and that the Court had jurisdiction to grant the relief asked. *Duder v. Amsterdamsch Trustees Kantoor*, 71 L. J. Ch. 618; [1902] 2 Ch. 132.

In an action for the redemption of a foreign mortgage the *lex situs* would probably be applied, unless the defendant had contracted that it should not. *Bent v. Young*, (1838) 9 S. 180; Westlake, *Private International Law*, 4th ed., 214.

Redemption of foreign mortgage.

Foreclosure was decreed of an equitable mortgage in the English form of lands in Scotland by memorandum of deposit of Scottish title deeds, although by the law of Scotland the deposit and agreement did not create any lien or equitable mortgage upon the estate. *Ex parte Pollard*, (1840) Mont. & Ch. 239.

Jurisdiction though charge invalid by *lex situs*.

If, indeed, the law of the land where the land is situate should not permit or enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him so to do.

Not when forbidden by *lex loci*.

The jurisdiction appears to have been rested in the above quoted cases, not on the domicile or nationality of the parties, but on the contract being entered into within the jurisdiction, and on the fact that the defendant is present within jurisdiction, or is a person upon whom the legislature of this country has by Ord. XL. r. 1 (g) authorized service outside the jurisdiction.

Trespass
to or title
to foreign
land.

The Court has no jurisdiction to inquire into the title of foreign land or to give damages for trespass to foreign land. *Pike v. Eden*, (1768) 2 Eden, 182; *Reiner v. Salisbury*, (1876) 2 C. D. 378; *Graham v. Massey*, (1883) 23 C. D. 743; *British South Africa Co. v. Companhia de Moçambique*, 63 L. J. Ch. 816; [1893] A. C. 602.

Offer to
redeem.

Every action by an owner of an equity of redemption who admits a mortgage against a mortgagee must expressly or in substance contain an offer to redeem. *Troughton v. Binks*, (1801) 6 Ves. 573; *Inman v. Wearing*, (1850) 3 De G. & S. 729; *Harding v. Tingey*, (1865) 34 L. J. Ch. 13; *Hughes v. Cook*, (1865) 34 B. 407; *National Bank of Australasia v. United Company*, (1879) 4 A. C. 391.

Co-owner.

A co-owner who has mortgaged his share to another co-owner cannot enforce partition without redeeming the mortgage. *Gibbs v. Haydon*, (1882) 30 W. R. 726; *Sinclair v. James*, 63 L. J. Ch. 873; [1894] 3 Ch. 554.

Where
other
relations
exist.

There is an exception when there are other relations between the parties than those of a mortgagor and mortgagee. If a mortgagee becomes a party to the creation of trusts affecting the equity of redemption, he cannot object to any person interested in those trusts taking the necessary steps for enforcing their due performance without redeeming the mortgage. *Jeffreys v. Dickson*, (1866) 35 L. J. Ch. 376; 1 Ch. 183.

Convey-
ancing
Act, 1881,
s. 25.

Another exception is due to the statute, which enables a mortgagor to ask for a sale without offering to redeem.

The Conveyancing Act, 1881, s. 25:—Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone or for sale alone, or for sale or redemption in the alternative.

It has also been held that a mortgagor may apply by originating summons for, under Ord. LIV. r. 1, the

determination of a question of construction arising under the mortgage deed without offering to redeem. *Nobbs v. Law Reversionary Interest Society*, [1896] 2 Ch. 830.

A mortgagor who brings an action denying the validity of the mortgage and containing no prayer for redemption, will not be allowed, when the mortgage is established against him, to redeem in that action. In such a case his action will be dismissed without prejudice to his right to bring a regular action of redemption. *Johnson v. Fesemeyer*, (1858) 25 B. 88; *Crenver Mining Co. v. Willyams*, (1866) 35 B. 353.

Validity of mortgage denied.

This rule does not apply where the issue is not simply mortgage or no mortgage, as, for example, when a mortgagee not relying wholly on his title as mortgagee claims that by acts subsequent to the mortgage he has become absolute owner. *National Bank of Australia v. United Company*, *supra*.

This rule is justified as a corollary of the previous one. A mortgagor has no right to sue the mortgagee at all, except for the purpose of redemption, and if he does not expressly or in substance offer, or rather ask, to redeem, he is not *rectus in curia*. *Jervis v. Berridge*, (1873) 44 L. J. Ch. 164; 8 Ch. 351, 358.

A default in payment by mortgagor after judgment for redemption operates as a foreclosure. It is a necessary part of a judgment for redemption that on default of payment the person who has made default be foreclosed of his equity of redemption.

Default in payment operates as a foreclosure.

A decree *nisi* of foreclosure and redemption confers rights on both mortgagor and mortgagee. Therefore, after judgment the plaintiff is no longer *dominus litis*, so that he can dismiss the action without the leave of the Court. *Stevens v. Theatres, Ltd.*, 72 L. J. Ch. 764; [1908] 1 Ch. 857.

Decree *nisi* for foreclosure.

Puisne mortgagee failing to redeem.

A puisne mortgagee, bringing an action against prior mortgagee and mortgagor asking for redemption and foreclosure can obtain no relief against the mortgagor if his action is dismissed against the prior mortgagee in consequence of his not redeeming. *Hallett v. Furze*, (1885) 55 L. J. Ch. 226; 31 C. D. 312.

Secus, where there are different mortgaged estates, for a puisne mortgagee can abandon part of his security without injury to the rest. Thus, if one estate is mortgaged to A. and another estate to B. and then both to C., in an action by C. against A. and B. and the mortgagor, by the terms of the judgment, C. on default of payment to A. would be foreclosed as to A.'s estate and ordered to pay the costs relating to A., but could still redeem B. and hold his estate for what he paid B. and for his own debt. *Pelly v. Wathen*, (1849) 18 L. J. Ch. 281; 7 H. 351; reported also 21 L. J. Ch. 105, on appeal, but only as to extent of solicitor's lien.

Dismissal of redemption action.

Dismissal for any cause, except want of prosecution, of an action for the redemption of a legal mortgage, operates as a decree of foreclosure against the plaintiff.

The mortgagor, by commencing the action, admits the title of the mortgagee and the mortgage debt; by default he admits that he is unable to redeem.

The admission of the mortgagor that he cannot pay extinguishes his equity of redemption, but does not otherwise enlarge the legal rights of the mortgagee; if the mortgagee requires substantial relief in order to perfect his title, he must obtain it in an action for that purpose.

Of equitable mortgage.

Dismissal of an action for redemption of an equitable mortgage by deposit of deeds does not pass the legal estate to the mortgagee. *Marshall v. Shrewsbury*, (1875) 44 L. J. Ch. 302; 10 Ch. 250.

As therefore the mortgagee does not obtain the relief

of a foreclosure decree, he is not debarred from suing, as he would be after foreclosure of a legal mortgage.

A mortgagee cannot be compelled to take his money in dribblets, therefore any person coming to redeem, however small may be his own interest, must pay the mortgagee all to which he is entitled. *Cholmondeley v. Clinton*, (1820) 3 J. & W. 134; *Palk v. Clinton*, (1806) 12 Ves. 59; *Wilson v. Cluer*, (1840) 9 L. J. Ch. 333.

Mortgagee not compelled to take his money in dribblets.

There is no obligation on the mortgagee to require the presence, as parties to the action, of all persons interested in the equity of redemption. He may convey the estate to any person interested, but must in the reconveyance preserve the rights of all persons interested in the equity of redemption. *Pearce v. Morris*, (1869) 39 L. J. Ch. 342; 5 Ch. 227.

Mortgagee may reconvey on payment to any person interested in equity of redemption.

A mortgagee cannot demand conclusive proof of interest in the mortgaged property as a condition precedent to the right of redemption. A person showing a *primâ facie* title to represent the whole estate of the mortgagor can, in the absence of proof of a better title, demand a reconveyance from the mortgagee on payment of what is due. A stranger has no such right. *James v. Biou*, (1819) 3 Sw. 234; 2 S. & S. 600; *Pym v. Bowreman*, (1793) 3 Sw. 241; *Lloyd v. Wait*, (1841) 1 Ph. 61.

Primâ facie right to property.

No right in stranger.

A rival claimant to the mortgagor's property, who has taken an assignment of the mortgage, cannot compel a plaintiff in a redemption action to prove conclusively his title, for the action is one of redemption, and not ejectment; but he may resist redemption by showing that he has a better title to the equity of redemption than the plaintiff. *Lloyd v. Wait*, *supra*.

After receipt of the mortgage money from one of the persons interested in the equity of redemption, a mortgagee cannot refuse to reconvey on the ground that the action

Refusal to re-convey after payment.

is defective from want of parties. *Pearce v. Morris, supra*; *Hall v. Heward*, (1886) 55 L. J. Ch. 604; 32 C. D. 480.

Payment
by person
with an
incom-
plete title.

But if the payment has been made by a person whose title is admittedly imperfect, as, for instance, a purchaser under an uncompleted contract, of a part of the equity of redemption; the mortgagee need not reconvey the property or hand over the deeds until the contract of purchase is completed. *Pearce v. Morris, supra*. See this case for form of reconveyance.

Import-
ance on
question
of costs.

A mortgagee, by refusing to accept payment and reconvey, makes an action for redemption necessary. The costs of such an action may be thrown on the mortgagee, if the plaintiff was not a stranger, but a person entitled to tender the money, and also entitled to demand a reconveyance. See pp. 278 and 280.

Mort-
gagee's
right is
recon-
veyance.

Formerly, there was no other obligation on a mortgagee than to reconvey, that is to hand over the mortgaged property to the mortgagor on payment in full, and final settlement of account.

It followed from this right :—

- (1) There could be no right to call for a transfer instead of a reconveyance, either by the mortgagor or by a puisne mortgagee. *Dunston v. Patterson*, (1847) 2 Ph. 345.
- (2) A puisne mortgagee could not adversely redeem a first mortgagee in the absence of the mortgagor, because the decree ought to go on to say that the estate be reconveyed to the mortgagor on payment by him to the puisne mortgagee. *Fell v. Brown*, (1787) 2 Bro. C. C. 276; *Farmer v. Curtis*, (1829) 2 S. 466.

A second mortgagee, under a covenant not to sue the mortgagor for ten years, could not during that time

compulsorily redeem the first mortgagee. *Ramsbottam v. Wallis*, (1835) 5 L. J. Ch. 92.

These rules have been modified by the following enactments :—

Conveyancing Act, 1881, s. 15 (1):—"Where a mortgagor is entitled to redeem, he shall by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

Obligation on mortgagee to transfer instead of re-conveying.

"(2) This section does not apply in the case of a mortgagee being or having been in possession.

"(3) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

The Conveyancing Act, 1882, s. 12:—"The right of the mortgagor, under sect. 15 of the Conveyancing Act of 1881 to require a mortgagee, instead of reconveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer."

The transfer under these sections is to be instead of a re-conveyance, and the transfer is to be on the terms on which the mortgagee would be bound to reconvey. *Teevan v. Smith*, (1882) 51 L. J. Ch. 621; 20 C.D. 724.

Therefore, a tenant for life of mortgaged property can only insist on a transfer which, in its terms, preserves the

rights of all other persons interested in the equity of redemption. *Alderson v. Elgey*, (1884) 26 C. D. 567.

The case is still stronger if the tenant for life has not paid the interest due from him, for then the transferee, if his conveyance was in terms absolute, would be able to sell the property and destroy the rights of the other persons interested in the equity. *Ibid*.

Originating
summons.

An originating summons under R. S. C. Ord. L.V.r. 5a, where there is no preliminary question to be tried, is the appropriate procedure for :—

Sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee. *Smith v. Davies*, (1886) 54 L. J. Ch. 278; 28 C. D. 650; *Blake v. Harvey*, (1885) 29 C. D. 827; *Bissett v. Jones*, (1886) 55 L. J. Ch. 648; 32 C. D. 635.

An originating summons is not as a general rule the proper form of procedure for determining priorities between two mortgages. *Re Giles*, (1890) 59 L. J. Ch. 226; 43 C. D. 391.

Appeal.

The time for appeal from a foreclosure judgment under an originating summons is one year from decree *nisi*. *Smith v. Davies*, (1886) 55 L. J. Ch. 596; 31 C. D. 595.

Effect of
fore-
closure.

So long as a mortgage is redeemable the conveyance of the legal estate to the mortgagee is regarded as nothing more than a security for a debt. The effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the mortgaged property, for the first time, in the person who previously was a mere incumbrancer. No conveyance is necessary in the foreclosure of a legal mortgage, but in the case of an equitable mortgage, the foreclosure order has to be supplemented by a conveyance from the mortgagor to the mortgagee. Orders foreclosing legal or equitable mortgages are liable

to be stamped as conveyances on sale. *Heath v. Pugh* (1881) 6 Q. B. D. 345; *Huntington v. Inland Revenue Commissioners*, 65 L. J. Q. B. 297; [1896] 1 Q. B. 422; *Lovell and Collard's Contract*, [1907] 1 Ch. 249.

For form of judgment of foreclosure:—

- (i.) Where the mortgage debt is payable by instalments. *Greenough v. Littler*, (1880) 15 C. D. 93.
- (ii.) When there is judgment on the personal covenant, combined with foreclosure. *Farrer v. Lacy, Hartland & Co.*, (1883) 55 L. J. Ch. 149; 31 C. D. 42.
- (iii.) When the mortgagee has been in possession. *Lacon v. Tyrrell*, W. N. (1887) 71.

If an order for personal payment is required, the covenant creating liability must be pleaded. *Wethered v. Cox*, W. N. (1888) 165.

If the defendant makes default in appearing or in pleading, or does not appear at the trial, the plaintiff cannot obtain any relief which is not expressly claimed in the statement of claim. *Faithfull v. Woodley*, (1889) 59 L. J. Ch. 304; 43 C. D. 287.

A writ which claims foreclosure or sale and a receiver besides payment of the debt and interest is not specially endorsed so as to entitle the plaintiff to summary judgment on the claim for debt and interest. *Imbert Terry v. Carver*, (1887) 56 L. J. Ch. 716; 34 C. D. 506.

For form of order:—

- (i.) In redemption action, where the mortgagee has been overpaid. *Ashworth v. Lord*, (1887) 57 L. J. Ch. 230; 36 C. D. 545; and see p. 142.
- (ii.) For accounts when the mortgagee has sold the mortgaged property. *Charles v. Jones*, (1887) 56 L. J. Ch. 745; 35 C. D. 544.

An order for foreclosure absolute, in respect of lands in Middlesex, is not a judgment within the meaning of Registration.

7 Anne, c. 20, s. 18, and 1 & 2 Vict. c. 110, so as to require a memorial to be registered. *Burrows v. Holley*, (1887) 56 L. J. Ch. 605; 35 C. D. 123.

Pending
Chancery
action,
Common
Law pro-
ceedings
oppres-
sive.

As, according to the form of order settled in *Farrer v. Lacy, Hartland & Co.*, *supra*, a mortgagee in a foreclosure action obtains a personal order for payment of the principal with interest down to the date of the certificate, it is improper to bring a second action with a writ indorsed for a definite amount, being the interest accrued since the first writ, less the amount of rents received. *Earl Poulett v. Viscount Hill*, 62 L. J. Ch. 466; [1893] 1 Ch. 277.

Pending a foreclosure action in the Chancery Division a second action brought in the King's Bench Division to recover principal and interest, is improper and should be stayed. *Williams v. Hunt*, 74 L. J. K. B. 364; [1905] 1 K. B. 512; *Lynde v. Waithman*, 64 L. J. Q. B. 762; [1895] 2 Q. B. 180.

Death of
a joint
mort-
gagee.

In an action of foreclosure by two joint mortgagees, after decree *nisi* and after certificate, but before the period fixed for payment to the two jointly, one of the mortgagees died and default in payment was subsequently made by the mortgagor; the order was made absolute at the instance of the surviving plaintiff. *Browell v. Pledge*, W. N. (1888) 166.

How far
action at
an end
after
decree
absolute.

A decree absolute is not a final order, in the sense that, under proper circumstances, it cannot be re-opened, see p. 239.

For inquiry for losses after foreclosure. *Taylor v. Mostyn*, (1886) 55 L. J. Ch. 893; 33 C. D. 226.

After decree absolute, the action is at an end, so that the mortgagee cannot obtain an order for the appointment of a receiver (*Wills v. Luff*, (1888) 57 L. J. Ch. 563; 33 C. D. 197); but an order for possession can be obtained after decree absolute, when the summons asked for

possession. *Keith v. Day*, (1888) 58 L. J. Ch. 118; 39 C. D. 452.

Where judgment in a foreclosure action had been pronounced, but had not been drawn up and entered, and it was discovered that there were puisne mortgagees, leave was given under R. S. C., 1888; Ord. XVI. r. 11, to amend the writ and statement of claim by making the puisne mortgagees defendants. *Keith v. Butcher*, (1884) 53 L. J. Ch. 640; 25 C. D. 750.

Amendment of claim after judgment.

When some of the mortgagees are out of the jurisdiction, before foreclosure an affidavit of non-payment by all the mortgagees within the jurisdiction, is required. *Docksey v. Else*, W. N. (1891) 65; *Kinnard v. Yorke*, (1889) 60 L. T. 380.

Affidavit of non-payment.

When the agent of the mortgagee attended at the place appointed for payment, without a power of attorney, and no one appeared for the mortgagor, the decree was made absolute. *Cox v. Watson*, (1877) 47 L. J. Ch. 263; 7 C. D. 196.

Attendance by agent without power of attorney to receive the money. Ejectment.

Prior to the Judicature Act, an action of ejectment must have been brought to enforce a foreclosure decree against a defendant refusing to deliver up possession.

But now, under Ord. LV. r. 5a, the plaintiff in an action for foreclosure or redemption may obtain an order against the defendant for delivery of the possession of the mortgaged property on or after the order absolute for foreclosure or redemption, as the case may be.

And under Ord. XVIII. r. 2, in case any mortgage security shall be foreclosed by reason of the default to redeem by any plaintiff in a redemption action, the defendant in whose favour such foreclosure has taken place may by motion or summons apply to a Court or a judge for an order for delivery to him of possession of the mortgaged property.

Order for delivery of possession.

An order for foreclosure absolute in a foreclosure action commenced by summons, may, as against the defendant mortgagor in possession (he having been served and not appearing) include an order for delivery of possession by him to the plaintiff, even though the summons did not ask for delivery. *Best v. Applegate*, (1887) 57 L. J. Ch. 506; 37 C. D. 42.

Not made
ex parte
unless
claimed
on sum-
mons.

When an application for foreclosure *nisi* or absolute is made *ex parte* delivery of possession will not be ordered unless it has been claimed by the summons. *Le Bas v. Grant*, W. N. (1896) 28.

When a summons for foreclosure asks for delivery of possession, and an order for foreclosure is made without any direction as to possession, an order for delivery of possession can be made after final foreclosure. *Keith v. Day*, *supra*.

An order for the delivery of the mortgaged property should contain a description of the property as set forth in the mortgage deed. *Thynne v. Sarle*, 60 L. J. Ch. 590; [1891] 2 Ch. 79.

Infants.

It has been already noticed that the Court has jurisdiction to order an immediate sale of mortgaged property belonging to an infant, if an immediate sale is for the infant's advantage. *Siffken v. Davis*, Kay, App. xxi.; see p. 180, *ante*.

Imme-
diate fore-
closure.

The Court has also power to order an immediate foreclosure against the infant heir of the mortgagor if the defendant enters an appearance, and it is clear from the evidence that the mortgaged property is not worth the money due on the mortgage, and the mortgagee offers to pay the infant's costs of the action as between solicitor and client. *Croxon v. Lever*, (1864) 12 W. R. 237; *Bennett v. Harfoot*, (1871) 19 W. R. 428.

In another case, the Court required besides such

evidence, as above, an affidavit by the guardian of the infant, stating that, in his opinion, it would be for the infant's benefit that the proposed order should be made, and showing the grounds of his opinion. *Wolverhampton and Staffordshire Banking Co. v. George*, (1883) 24 C. D. 707.

The ordinary decree for foreclosure against an infant contains what is commonly known as a day to show cause, that is to say, leave reserved to the infant on being served with a subpoena to show cause against the judgment within six months after his coming of age. *Mellor v. Porter*, (1883) 53 L. J. Ch. 178; 25 C. D. 158.

Day to
show
cause.

Under this clause the infant may show errors in the decree, but he may not put in a new answer or unravel the accounts. *Mallack v. Galton*, (1734) 3 P. Wms. 352; *Winchester v. Beavor*, (1796) 3 Ves. 314; *Williamson v. Gordon*, (1812) 19 Ves. 114.

In foreclosure of legal mortgages, this practice has not been altered by the Trustee Act, 1850 (13 & 14 Vict. c. 60). *Newbury v. Marten*, (1851) 15 Jur. 166.

In foreclosure of equitable mortgages, the Court cannot order an infant mortgagor to convey immediately the legal estate and then declare him a trustee of the legal estate; he must be ordered to convey when he attains the age of twenty-one years, and he must have a day to show cause. *Price v. Carver*, (1837) 3 My. & Cr. 157; *Mellor v. Porter*, *supra*.

When the infant is in fact a trustee, as when the legal estate has, owing to the disclaimer of trustees, descended to him, the Trustee Act applies though the infant may have a beneficial interest. *Foster v. Parker*, (1878) 8 C. D. 147.

An infant has no right to six months in a case where he is ordered to make a conveyance of an estate directed Sale.

by the Court to be sold for the payment of debts, or even for the payment of a single debt. *Scholefield v. Heafield*, (1836) 7 S. 669; 8 S. 470; 7 L. J. Ch. 4.

It would probably now be held that the Court has an absolute power to order a sale of mortgaged property to which an infant is entitled; and on the sale of property equitably mortgaged, to make an order for immediate conveyance which would bring the case within the Trustee Act, see the Conveyancing Act, 1881, s. 25 (ii.).

Fore-
closure of
property
vested in
Crown.

The Court cannot make a decree of foreclosure against the Crown, nor direct the Crown to convey to a purchaser. If therefore the equity of redemption of freehold or leasehold mortgaged property is in the Crown, the decree gives the mortgagee liberty to hold the mortgaged property until the Crown shall think fit to redeem the same and also to apply for a sale. *Hancock v. Attorney-General*, (1864) 33 L. J. Ch. 661; *Bartlett v. Rees*, (1871) 12 Eq. 395.

SUCCESSIVE REDEMPTIONS AND FORECLOSURES.

Position of
mesne
incum-
brancers.

When there are more incumbrances than one, the mesne incumbrancers must successively redeem all prior to them, or be foreclosed; and must be redeemed by, or will be entitled to foreclose all subsequent to them.

Prior mortgagees need not be parties to foreclosure action by puisne mortgagees against mortgagor and subsequent mortgagees. Prior mortgagees cannot be redeemed by a puisne mortgagee, unless mortgagor and subsequent mortgagees are parties. *Rose v. Page*, (1829) 2 S. 471; *Richards v. Cooper*, (1842) 5 B. 304; *Slade v. Rigg*, (1849) 3 H. 35.

Successive
foreclo-
sures and

The old rule was that six months from the date of the

certificate was given to the party first entitled to redeem, and three months each to the succeeding ones. redemptions.

In many modern cases it has been considered that successive periods of redemption impose an undue delay, and may impose great expense on a first mortgagee if the priorities of the puisne mortgagees are not ascertained.

Successive periods of redemption are not given as a right to the mortgagor. Encumbering the equity of redemption so that there are several persons interested in the property gives no right to any further period of redemption. Not dependent on any right in the mortgagor.

Puisne mortgagees, defendants to a foreclosure action, who appear at the bar or put in a defence, and whose priorities are admitted or proved, may have successive periods of redemption. *Bartlett v. Rees*, (1871) 40 L. J. Ch. 599; 12 Eq. 396; *Smith v. Olding*, (1884) 54 L. J. Ch. 250; 25 C. D. 462; *Platt v. Mendel*, (1884) 54 L. J. Ch. 1145; 27 C. D. 246; *Coleman v. Llewellyn*, (1886) 56 L. J. Ch. 1; 34 C. D. 143. When priorities proved or admitted.

One period only is allowed to defendants who do not appear, whether the statement of claim alleges that they were "entitled," or only that they "claimed to be entitled" to incumbrances. *Doble v. Manley*, (1885) 54 L. J. Ch. 636; 28 C. D. 664. Defendants not appearing.

Puisne incumbrancers appearing in an action of foreclosure by first mortgagees, and asking for successive periods, will not obtain them unless their securities and their priorities are either proved or admitted. *Smithett v. Hesketh*, (1890) 59 L. J. Ch. 567; 44 C. D. 161. Puisne mortgagees appearing.

Only one period is allowed where puisne mortgagees contest their priorities *inter se*. *Tufnell v. Nichols*, W. N. (1887) 52. Only one period allowed.

The judgment will be without prejudice to their

priorities, but will not direct an inquiry to arrange their order.

For forms of order, see Seton, 6th ed., p. 1979; *Bartlett v. Rees*, (1871) 40 L. J. Ch. 599; 12 Eq. 395; *Smithett v. Hesketh*, *supra*.

A matter
of dis-
cretion.

In a foreclosure action by first mortgagee of a reversionary interest, the Court directed two periods of six months and one month for redemption at the request of the second mortgagee on evidence that the interest was valuable and might fall in. *Bertlin v. Gordon*, W. N. (1886) 31.

When first mortgagees, being also fourth mortgagees, ask for a further period of redemption, a third period of redemption may be given to incumbrancers subsequent to the fourth. *Smithett v. Hesketh*, *supra*.

One period is the usual rule, and the most convenient; it requires special circumstances for successive periods. *Mutual Life Assurance v. Langley*, (1886) 26 C. D. 692.

Procedure
on suc-
cessive
decrees.

When successive periods are allowed, decrees absolute must be obtained against the prior incumbrancers making default, before the master can make his certificate of the sums due from those next entitled to redeem. *Whitbread v. Lyall*, (1856) 25 L. J. Ch. 791; 8 D. M. & G. 383; *Coleman v. Llewellyn*, *supra*.

Costs on
successive
foreclo-
sures and
redemp-
tions.

As each mortgagee adds his costs to his debt, all costs are ultimately borne by the last mortgagee, if he redeems. Therefore, if the plaintiff is first and also fifth mortgagee, he must either redeem the fourth, assuming he has redeemed in his turn, or have the action dismissed against him with costs. *Mutual Life Assurance v. Langley*, (1886) 32 C. D. 460.

Plaintiff
failing to
redeem.

A puisne mortgagee, bringing an action to redeem and foreclose, if he fails to redeem prior incumbrancers, pays the mortgagor's costs. *Pelly v. Wathen*, (1849) 18 L. J.

Ch. 281 ; 7 H. 351 ; *Hallett v. Furze*, (1885) 55 L. J. Ch. 226 ; 31 C. D. 312.

ENLARGEMENT OF TIME.

The mortgagor may ask for an enlargement of time for redeeming a mortgage before the day fixed for the decree arrives, and to open the foreclosure after the order for foreclosure has been made absolute. *Patch v. Ward*, (1867) 3 Ch. 203.

Enlargement of time.

The difference between them is that comparatively slight circumstances will induce the Court to enlarge the time fixed before the day for payment arrives. After the decree absolute has been made, it is *res judicata* between the parties, and will not be set aside except for strong grounds.

Difference between enlargement of time and opening foreclosure.

A plaintiff is in a worse position than a defendant for obtaining an indulgence, for he ought not to have commenced litigation unless he were able to fulfil his obligations. *Faulkner v. Bolton*, (1835) 7 S. 319.

Mortgagor redeeming.

The plaintiff in a redemption action who does not pay principal and interest at the time appointed will not be allowed to redeem, although before the motion to dismiss is made he has tendered the amount. But if the delay in payment has arisen from a *bonâ fide* mistake as to the date fixed for payment, the Court may extend the time. *Faulkner v. Bolton*, *supra* ; *Collinson v. Jeffery*, 65 L. J. Ch. 375 ; [1896] 1 Ch. 644.

An immediate payment of the interest and costs as a condition of the enlargement is required, and the person redeeming is not required afterwards to pay interest upon the interest which he has already paid. *Elton v. Curteis*, (1879) 51 L. J. Ch. 60 ; 19 C. D. 49.

Immediate payment of interest and costs necessary.

When rents have been received either by the mort-

Rents received

before
date fixed
for pay-
ment.

gagee or by a receiver between the date of the certificate and the day fixed for redemption, those rents should be taken into account, and a further period of a month allowed for redemption from the date of the fresh certificate. *Jenner-Fust v. Needham*, (1886) 55 L. J. Ch. 629; 32 C. D. 582.

In *Simmons v. Blandy*, 66 L. J. Ch. 88; [1897] 1 Ch. 19, the order was that the mortgagees should be charged with what (if anything) should have been paid into Court by the receiver, and such sum as should be in the receiver's hand at the date of the certificate, and also such a sum (if any) as the mortgagees should submit to be charged with in respect of rents and profits to come into the receiver's hand prior to the order for foreclosure absolute.

When
retained
in medio.

The order may specially provide for the holding of the funds received *in medio*, so that they form part of the *corpus* of the mortgaged property, which will come to the mortgagee only in case the foreclosure is made absolute, and in case of redemption belong to the mortgagor. *Coleman v. Llewellyn*, (1886) 56 L. J. Ch. 1; 34 C. D. 143.

Such a direction will not be inserted in the order unless there are special circumstances in the case. *Cheston v. Wells*, 62 L. J. Ch. 468; [1893] 2 Ch. 151.

Receipt of
rents after
day fixed
for re-
demption.

Receipt of rents after default has been made in payment of the principal and interest on the day fixed for redemption, but before the affidavit of such default is sworn is no ground for a further account and a fresh period for redemption, because after default in payment the mortgagee has become or is entitled to become the absolute owner. *National Permanent Society v. Raper*, 61 L. J. Ch. 73; [1892] 1 Ch. 54.

Final
foreclo-
sure

In a foreclosure action against puisne mortgagee and the mortgagor, receipt of rents by the first mortgagee

after the time fixed for redemption by a puisne mortgagee and before final foreclosure did not reopen the certificate against him, but an order was made to foreclose absolutely the puisne mortgagee and an account was directed against the mortgagor. *Webster v. Patteson*, (1884) 25 C. D. 626. against
puisne
mortgage
before
foreclo-
sure of
mort-
gagor.

OPENING FORECLOSURE.

Though strong grounds are necessary, they need not be of any special character. Grounds.

The following have been held sufficient :—

1. Actual fraud, not mere constructive fraud, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated, or over-estimated. *Patch v. Ward*, (1867) 3 Ch. 203.
2. Repeated statements by mortgagee, before and after decree absolute, that he wanted the money, not the property; the property was considerably in excess of the debt, and the mortgagor was prompt in making tender of the whole amount. *Thornhill v. Manning*, (1851) 20 L. J. Ch. 604; 1 Sim. N. S. 451.
3. The property was three times the value of the debt. *Ford v. Wastell*, (1847) 16 L. J. Ch. 372; 6 H. 229.
4. The money was ready, but owing to illness and accident could not be paid at the exact time. *Jones v. Creswicke*, (1839) 9 L. J. Ch. 113; 9 S. 304; and see the cases collected in the note.
5. The property was reversionary; the default in payment was owing to a reasonable belief by the mortgagor that he had purchased the mortgagee's

interest. A sale had been made, but the purchaser had full knowledge of all the circumstances and bought before the decree was made absolute. *Campbell v. Holyland*, (1877) 47 L. J. Ch. 143; 7 C. D. 166.

In all the above cases the application to the Court was prompt.

Fore-
closure
absolute
only in
form.

The principle in a Court of equity has always been that a mortgage, though an absolute conveyance when the condition is broken, in equity is always a security, and that, although in an action to enforce or redeem a mortgage security an order of foreclosure absolute appears to be a final order of the Court, it is not so, but the mortgagee still remains liable to be treated as mortgagee subject to the discretion of the Court. *Campbell v. Holyland*, *supra*.

Foreclosure is also opened by suing on the covenants for payment, see p. 8.

In re-
demption
action.

There appears to be no case which decides that a foreclosure decree absolute could not be opened in favour of a mortgagor who had commenced an action of redemption, and been foreclosed in default of payment. As in an application for enlargement, a plaintiff under such circumstances would require a strong case. *Faulkner v. Bolton*, (1895) 48 L. J. Ch. 81.

Money
Lenders
Act, 1900
(63 & 64
Vict. c.
51), s. 2.

In an equitable action by a borrower to recover securities mortgaged to an unregistered money lender, the mortgagee will not be ordered to give up to the mortgagor the securities, the subject of the mortgage, except upon the terms that the mortgagor shall repay the money which has been advanced to him. *Lodge v. National Union Investment Company, Ltd.*, [1907] 1 Ch. 300.

CHAPTER XIII.

PARTIES TO ACTIONS.

ANY person interested in the equity of redemption is entitled to redeem, and if, being so entitled, he tenders the mortgage money and interest, he, having a part in the equity of redemption, is entitled to the delivery of the title deeds, and to have a conveyance of the property. *Keech v. Hall*, (1778) 1 Doug. 21; *Pearce v. Morris*, (1869) 39 L. J. Ch. 342; 5 Ch. 227; *Tarn v. Turner*, (1888) 57 L. J. Ch. 1085; 39 C. D. 456.

Any person interested entitled to redeem.

Every person entitled to redeem who is forthcoming and can be made a party, is a necessary party to an action of redemption. *Fell v. Brown*, (1787) 2 Bro. C. C. 276; *Farmer v. Curtis*, (1829) 2 S. 466. This rule is based on the right of the mortgagee to account once only, which can only be done if the account is taken in the presence of all the parties who could demand an account. *Palk v. Clinton*, (1806) 12 Ves. 48.

Every one entitled to redeem is a necessary party, if forthcoming.

It is not restricted to actions of redemption, but applies to all actions against a mortgagee in cases where there are parties, interested in the equity of redemption, who, if not made parties, might harass him with future actions.

If the person seeking redemption brings an action against the mortgagee and has himself only a partial interest in the equity of redemption, he ought to bring in as parties to the action all other persons interested in the equity of redemption. *Cholmondeley v. Clinton*, (1820) 2 J. & W. 134.

Exceptions.

Exceptions to the rule are :—

- (a) Contingent remaindermen and persons having an interest in the mortgaged property subsequent to a vested estate of inheritance, whose owner is on the record.
- (b) Persons sufficiently represented by others who are on the record, and have a duty or an interest to protect the absent parties.
 - (1) R. S. C., Ord. XVI. r. 8. Trustees, executors, and administrators may sue and be sued on behalf of, or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons ; but the Court or a judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties.
 - (2) R. S. C., Ord. XVI. r. 9. Where there are numerous persons having the same interests in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

Also to fore-closure action.

Subject to similar exceptions, every person entitled to redeem is a necessary party to a foreclosure action. A decree of foreclosure was refused in the absence abroad of a devisee of the mortgagor entitled to one-third of the equity of redemption. *Caddick v. Cook*, (1863) 32 L. J. Ch. 769.

According to the above rules, with a few exceptions, every person having an interest, however small, in a mortgaged property, is a necessary party to foreclosure or redemption. In many cases, the result of rigidly adhering to the rules would be that such actions would be impossible. Result of above rules.

The difficulty has arisen from the ambiguous use of the term, "necessary party."

A necessary party may stand in one of three different positions:—He may be a necessary party to a suit because other parties to the record cannot have justice done to them in his absence; or he may be a necessary party as having an interest of his own, which interest the Court may be able to protect by saving his rights in the decree; or he may have an interest of his own which the Court may not be able to protect, if a decree be made in his absence. *Faulkner v. Daniel*, (1849) 10 L. J. Ch. 33; 3 H. 212. Definition of "necessary."

It is suggested that the result of the cases mentioned below is, that the necessity of adding as parties all persons interested is a matter within the discretion of the Court in each case, and that the severity of the strict rule will be more easily relaxed in actions of redemption than of foreclosure.

The reason of the difference in this respect between redemption and foreclosure actions is that in a redemption action it may be possible to provide by the terms of the reconveyance that the rights of all persons interested in the equity of redemption shall remain the same. In a foreclosure action unless the money is paid the property is lost. *Francis v. Harrison*, (1889) 59 L. J. Ch. 248; 43 C. D. 183; *Griffith v. Pound*, (1889) 59 L. J. Ch. 522; 45 C. D. 553. Difference between foreclosure and redemption as regards representation of absent parties.

In an action of redemption the danger to be guarded

against is that the mortgagee may be harassed by a second account. This danger must be considered with reference to the state of the accounts and of the property, and the probability that any danger will in fact ever result to him. When real and personal property was mortgaged to secure one debt, redemption of the whole mortgaged property by the executor was allowed, in the absence of the heir, who could not be found, though the mortgagee had been in possession. *Hall v. Heward*, (1886) 55 L. J. Ch. 604; 82 C. D. 480.

Effect of
absence of
necessary
parties in
foreclo-
sure.

The omission of necessary parties in a foreclosure action prevents the proceedings from binding the absent parties; but those present who might, but did not object, are, notwithstanding the imperfection of the action, bound by the decree of foreclosure.

A person bound by the decree of foreclosure, afterwards acquiring the interest of a person not bound, can redeem in right of his acquired interest. *Bromitt v. Moor*, (1851) 9 H. 374.

First
mortgagee
without
notice of
second
mort-
gagee.

After a decree has been obtained by the first mortgagee to foreclose the mortgagor, a second mortgagee may redeem the first, though the first mortgagee had no notice of the second mortgagee before the decree. *Godfrey v. Chadwell*, (1707) 2 Vern. 601.

Mort-
gagor.

The original mortgagor, until he has absolutely assigned his equity of redemption, is a necessary party to actions of foreclosure and redemption, *i.e.*, in the absence of the mortgagor a prior mortgagee cannot foreclose subsequent incumbrancers. *Moore v. Morton*, W. N. (1886) 196.

Smallness
of his
pecuniary
interest
imma-
terial.

A mortgagor who has created a mortgage for a term of 200 years on his life estate in a mortgaged property was held to be a necessary party to a redemption action brought by the purchaser of the term against the mort-

gagee of the whole estate. *Hunter v. Maclew*, (1846) 5 H. 238.

After an absolute assignment of his equity of redemption, a mortgagor, though remaining liable on his covenants, has no interest in the mortgaged property. He cannot bring an action to redeem and is not a necessary party to a foreclosure action. Nevertheless on being sued on his covenants he acquires a new interest in virtue of which he can redeem. *Kinnaird v. Trollope*, (1889) 58 L. J. Ch. 556; 42 C. D. 610; see p. 8.

After
absolute
assign-
ment.

When the equity of redemption has been settled, it is unnecessary in a foreclosure action to add as parties—

Settled
equity of
redemp-
tion.

(1) Contingent remaindermen, so long as their estates are contingent.

(2) Remaindermen after an estate tail. *Lloyd v. Johns*, (1803) 9 Ves. 37; *Giffard v. Hort*, (1804) 1 Sch. & Lef. 386.

Redemption of a settled equity of redemption has been allowed by tenant in tail (*Playford v. Playford*, (1845) 4 H. 546); by tenant for life (*Aynsley v. Reed*, (1754) 1 Dick. 249; *Haymer v. Haymer*, (1679) 2 Vent. 348); by tenant for life where the mortgage was in the form of a conveyance upon trust to sell. *Wicks v. Scrivens*, (1860) 1 J. & H. 215.

Redem-
tion by a
limited
owner.

A limited owner redeeming pays as limited owner out of his income interest to himself.

Position of
limited
owner re-
deeming.

He cannot, therefore, foreclose during the continuance of his estate, but after the determination of his estate he or his representatives can foreclose, but cannot resist redemption by those interested in remainder to his own estate. *Cousens v. Harris*, (1848) 17 L. J. Q. B. 273.

The personal representative of a deceased tenant for life is not a necessary party to an action brought by mortgagee

Personal
represen-
tative of

deceased tenant for life. against the remainderman praying foreclosure in default of payment of principal and an arrear of interest accrued due during the life of the tenant for life. *Wynne v. Styant*, (1847) 2 Ph. 303.

Tenant for life paying in excess of interest. *Secus*, in foreclosure or redemption, as to the personal representative of a deceased tenant for life who has paid more than the mortgage interest; for to the amount of the excess of interest the principal is reduced and to that extent the tenant for life is an incumbrancer. *Cholmondeley v. Clinton*, (1820) 2 J. & W. 134; *Faulkner v. Daniel*, (1843) 10 L. J. Ch. 33; 3 H. 199.

In excess of income. This reason does not apply in the case of a tenant for life who has paid the interest of the mortgage debt out of his own pocket, when the income of the mortgaged property was insufficient. *Kensington v. Bouverie*, (1859) 29 L. J. Ch. 537.

Mortgagor a necessary party. Puisne mortgagees cannot redeem adversely a first mortgagee in the absence of the mortgagor. *Ramsbottom v. Wallis*, (1835) 5 L. J. Ch. 92; see p. 234.

Mortgagee not a necessary party. Puisne mortgagees can foreclose the mortgagor in the absence of prior mortgagees. *Rose v. Page*, (1829) 2 S. 471; *Slade v. Rigg*, (1843) 3 H. 35; *Richards v. Cooper*, (1842) 5 B. 304.

Tender by puisne mortgagees. After a sufficient tender by a puisne mortgagee, a first mortgagee who commences an action of foreclosure does so at his own risk in respect of costs. The proper course for the first mortgagee is to convey to the puisne mortgagee the mortgaged property with or without the concurrence of the mortgagor. *Smith v. Green*, (1844) 1 Coll. 555.

Assignee of equity of redemption. An assignee of an equity of redemption is a necessary party to an action of foreclosure. The mortgagee has no contract with the assignee but can make him a party to a foreclosure action, and so enforce his rights.

Also, if the mortgagee sues the original mortgagor on his covenant, then the mortgagor would be entitled to enforce his right of indemnity against the assignee of the equity of redemption. *In re Law Courts Chambers Co.*, (1889) 61 L. T. 669.

Assignees of parts of the equity of redemption are Assignees. necessary parties in redemption and foreclosure.

Numerous purchasers to whom a mortgaged estate was sold in lots are all necessary parties in a foreclosure action. *Cholmondeley v. Clinton*, *supra*; *Peto v. Hammond*, (1860) 29 B. 91.

So, also, numerous debenture holders having a charge on the mortgaged property. *Griffith v. Pound*, (1889) 59 L. J. Ch. 522; 45 C. D. 553.

A person on whom has devolved a part of the equity of redemption can redeem the whole to protect his part, and when he has redeemed can, in an action for the administration of the mortgagor's estate, compel rateable contribution from the persons entitled to the other parts. *Marquis of Bute v. Cunynghame*, (1826) 2 R. 275; *Averall v. Wade*, (1835) Ll. & G. 252; *Leonino v. Leonino*, (1879) 48 L. J. Ch. 217; 10 C. D. 460; *In re Athill*, (1880) 50 L. J. Ch. 123; 16 C. D. 211; *Dunlop v. Dunlop*, (1882) 21 C. D. 583.

Mortgaged estates, by the death of the mortgagor, devolved on A. and B. The presence of A. was held to be necessary in an action of foreclosure and redemption by a second mortgagee of B.'s share (*Palk v. Clinton*, 12 Ves. 48); and in an action of redemption by B. against his mortgagee and the mortgagee of the whole estate. *Cholmondeley v. Clinton*, *supra*.

Two properties subject to one mortgage.

In such a case, on proof that A. cannot be found, the Court will, in a redemption action, not hang up the whole proceedings, but in the form of reconveyance preserve his

rights. *Hall v. Heward*, (1886) 55 L. J. Ch. 604; 32 C. D. 480.

Assignees
pendente
lite.

If one of the parties has assigned his interest *pendente lite* :—

- (i.) The other party is entitled to have the assignee added as a party to the action.
- (ii.) The assignee is entitled to have himself added, *Campbell v. Holyland*, (1877) 47 L. J. Ch. 145; 7 C. D. 166.
- (iii.) The assignee is not obliged to have himself added, but must see that the Court is not misled by his choice not to take part in the action.

For example, the Court was misled when there was an assignment by second to third mortgagee during a foreclosure action, and before decree absolute the second mortgagee made an affidavit that he had received nothing. In fact, sums had been received by the third mortgagee, either in his own right or as assignee of the second. *Patch v. Ward*, 3 Ch. 208.

Person
having
contract
to pur-
chase.

A person who has a contract to purchase a mortgaged property or a partial interest in it, may tender the sum due for principal, interest, and costs to a mortgagee threatening to sell, but until any disputes as to the validity of his contract of purchase are settled, he cannot demand a reconveyance, and therefore, presumably, is not a necessary party to a foreclosure action. *Tasker v. Small*, (1837) 5 L. J. Ch. 321; 3 My. & C. 69; *Pearce v. Morris*, (1869) 39 L. J. Ch. 342; 5 Ch. 227.

The liabilities of a mortgagee, who refused to accept a sufficient tender from such a person and continued the sale, were discussed in this case, but no decision was given.

Volun-
teers.

Prior to 1893, a voluntary conveyance was void against a subsequent mortgage to the extent of the mortgage,

and therefore volunteers could redeem a subsequent mortgage in order to protect their interests. *Thorne v. Thorne*, (1688) 1 Vern. 182.

Now by the provisions of the Voluntary Conveyances Act, 1898 (56 & 57 Vict. c. 21), no voluntary conveyance is deemed fraudulent within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or can be defeated under any of the provisions of the said Act.

Trustees of a settled equity of redemption sufficiently represent the *cestuis que trust* in a redemption action, no direction to the contrary having been given by the Court. *Mills v. Jennings*, (1880) 13 C. D. 639.

Trustees of settled equity of redemption in redemption action.

But not so in a foreclosure action, unless it is probable that the defendant trustees, from being executors or otherwise, have funds applicable to the redemption of the property. Except in this case, it would not be right to foreclose all persons interested in the settlement, without making them parties and giving them an opportunity to redeem. *Goldsmid v. Stonehewer*, (1852) 9 H. App. xxxviii; *Hanman v. Riley*, (1852) 9 H. App. xl.

In foreclosure action.

It is, however, possible that trustees may sufficiently represent infant *cestuis que trust* and the trustees of subordinate interests under settlements in favour of infants, since such persons cannot reasonably be expected to be in a position to redeem. *Goldsmid v. Stonehewer*, *supra*.

An insolvent trustee is not a sufficient party to a foreclosure decree, so that the *cestuis que trust* may be bound. Unless the trustee has funds to pay the debt, the *cestuis que trust* are necessary parties to the action. *Francis v. Harrison*, (1889) 59 L. J. Ch. 248; 43 C. D. 183; *Griffith v. Pound*, *supra*.

Cestuis que trusts necessary parties.

Trustees to whom a mortgagor has conveyed an equity Trustees

to sell and
pay debts.

of redemption, upon trust to sell and pay debts, are not necessary parties to a foreclosure action when the deed is voluntary. If they are made parties the costs of adding them may be disallowed to the mortgagee. *Slade v. Rigg*, (1843) 3 H. 35. But they may redeem at least in a foreclosure action to which the mortgagor is a party. *Smith v. Baker*, (1842) 1 Y. & C. 223.

In a case where a mortgagee transferred his mortgage security to trustees for his creditors upon trust to sell, with an ultimate trust for himself, he was allowed afterwards to bring an action of foreclosure against the original mortgagor, without adding any of the creditors, who were sufficiently represented by their trustees, parties to the action. *Morley v. Morley*, (1858) 25 B. 253.

Creditors
secured
by trust
deeds.

Creditors secured by trust deeds cannot have an action for redemption except through their trustees, unless a special case is made, as that the trustees are colluding or unsafe. Where the property is insufficient to pay the debts in full, a creditor, if allowed to redeem, would probably be held to have redeemed on behalf of all so as to get no preference for himself. *Troughton v. Binks*, (1801) 6 Ves. 573; *Yeatman v. Yeatman*, (1877) 47 L. J. Ch. 6; 7 C. D. 210.

Subject to a similar exception, creditors in the bankruptcy of the mortgagor or mortgagee and legatees must sue by the trustee or executors. *Troughton v. Binks*, *supra*.

No distinction seems to be taken between the creditors and the legatees of a mortgagee suing for foreclosure and those of a mortgagor suing for redemption or accounts.

Creditors
by simple
contract.

Creditors of the mortgagor by simple contract cannot commence an action for accounts and redemption, unless they can prove collusion between mortgagor and mortgagee. *White v. Parnter*, (1829) 1 Knapp, 229.

Any person interested in the equity of redemption can redeem to protect his interest, as for example a tenant for years, by an agreement from the mortgagor which is not binding on the mortgagee. *Pearce v. Morris*, (1869) 39 L. J. Ch. 342; 5 Ch. 227; *Tarn v. Turner*, (1888) 57 L. J. Ch. 1085; 39 C. D. 456. Tenant for years.

Judgment creditors obtain an interest in the land of the mortgagor by either actual delivery of the land in execution under the provisions of 27 & 28 Vict. c. 112, s. 1, or equitable execution. Judgment creditors.

Equitable execution, which is execution by "other lawful authority" within the meaning of this Act, is of two kinds:—

- (1) A judgment creditor, who cannot obtain delivery by the sheriff of his debtor's land by reason of the legal estate being outstanding, will be allowed, in an action to which prior incumbrancers and the debtor are parties, to redeem and foreclose. *Neate v. Duke of Marlborough*, 3 My. & Cr. 407; *Hatton v. Haywood*, (1874) 43 L. J. Ch. 372; 9 Ch. 229; *Beckett v. Buckley*, (1874) 17 Eq. 435.
- (2) He may obtain the appointment of a receiver subject to the rights of any prior incumbrancers. *Anglo-Italian Bank v. Davies*, (1878) 47 L. J. Ch. 833; 9 C. D. 275; *Ex parte Evans, In re Watkins*, (1879) 13 C. D. 252.

Although, until delivery in execution, judgment creditors have not an interest in the land, and are therefore not necessary parties, yet if at any time before the decree is made absolute they do so obtain an interest, they can redeem, and must be added as parties to a foreclosure action. *Knight v. Pocock*, (1857) 27 L. J. Ch. 297; *Mildred v. Austin*, (1869) 8 Eq. 220; *Cork v. Russell*, (1871) 13 Eq. 210. Creditors with equitable execution.

Judgment creditors, until registration, are not necessary parties to a foreclosure action of land in a register county. *Johnson v. Holdsworth*, (1890) 20 L. J. Ch. 23.

Subject to
registration.

A person who by means of a writ of elegit or the appointment of a receiver is entitled to receive the income of the mortgaged property, would seem to be a person interested in the equity of redemption within the meaning of *Pearce v. Morris* and *Tarn v. Turner*, *supra*.

The Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 5, establishes at the office of the Land Registry a register of writs and orders affecting lands, and for registration therein of any writ or orders affecting land issued or made by any court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land.

The Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2, provides as follows:—

- (1) A judgment or recognizance, whether obtained or entered into on behalf of the crown or otherwise, and whether obtained or entered into before or after the commencement of this Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land unless or until a writ or order for the purpose of enforcing it is registered under section five of the Land Charges Registration and Searches Act, 1888.

It is submitted that the right to redeem of a judgment creditor who has obtained by way of equitable execution a receiver of the mortgagor's land or interest in unpaid purchase money of land depends upon his order being

registered before the date of foreclosure absolute by a mortgagee.

A creditor, plaintiff in an action for the administration of the debtor's estate, who has obtained a decree for sale of the debtor's land, has sufficient interest in that land to redeem it, and to be a necessary party to a foreclosure action. *Christian v. Field*, (1842) 2 H. 177.

The mortgagor, when bankrupt, should not be made a party to an action for foreclosure, but his trustee may redeem and must be joined. *Kerrick v. Saffrey*, (1835) 4 L. J. Ch. 162; 7 S. 317; *Lloyd v. Lander*, (1821) 5 Mad. 282. Bankruptcy.

The mortgagee may, at his option, either come into the bankruptcy proceedings as a secured creditor, or, as an alternative remedy, seek foreclosure in the Chancery Division. Position of mortgagee.

The trustee of a bankrupt mortgagee can bring an action in the Chancery Division for foreclosure against the trustee of a bankrupt mortgagor. *White v. Simmons*, (1871) 40 L. J. Ch. 689; 6 Ch. 555; *Waddell v. Toleman*, (1878) 9 C. D. 212; *Ex parte Hirst, In re Wherly*, (1879) 11 C. D. 278. Trustee in bankruptcy.

On satisfaction of all debts and costs, a mortgagor who has been bankrupt may redeem any part of the mortgaged property which has not been realized, though no reconveyance by the trustee to him has been executed. (Bankruptcy Act, 1883, s. 65.) *Wearing v. Ellis*, (1856) 6 D. M. & G. 596; *Preston v. Wilson*, (1846) 5 H. 185. Of mortgagor after bankruptcy.

A surety, who mortgages his own property as collateral security for a mortgage debt secured on another property, has an interest in that property, so that he is a necessary party to actions for foreclosure or redemption. *Stokes v. Clendon*, (1818) 3 Sw. 150. Surety.

So, also, after payment of part of the debt, a surety After payment.

by personal covenant has an interest; for on payment of all or part of the mortgage he is *pro tanto* a mortgagee, and entitled to all the remedies of a mortgagee, and thus has an interest in the property but subject to the rights of the mortgagee in respect of any part of the debt which is unpaid. *Gedge v. Matson*, (1858) 25 B. 310; *Green v. Wynne*, (1869) 38 L. J. Ch. 220; 4 Ch. 204.

Knowledge of the mortgage security by the surety at the time of the suretyship is immaterial. *Pearl v. Deacon*, (1857) 26 L. J. Ch. 761; *Wade v. Coope*, (1827) 2 S. 155.

Mortgage of shares in a partnership.

In the absence of express provisions in the partnership articles, foreclosure of a mortgage of a share in the assets and business of the partnership would amount to dissolution of the partnership as regards the assigning partner.

Rights of assignee of share in partnership.

The Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31, sub-s. 1, provides that an assignee or mortgagee takes subject to equities, that is to say, that the partners can, during the continuance of the partnership, settle the accounts as they arise between them in the management or administration of the partnership, and that the mortgagee or assignee has no right whatever to interfere in the management or administration, or to require any accounts or to inspect the books, but in the absence of fraud is bound to take the accounts as agreed to by the partners.

A *bonâ fide* agreement by partners, subsequent to a mortgage of his share by one of them, to give themselves a salary in consideration of additional work is part of the management or administration of the business and is binding on the mortgagee. *In re Garwood's Trusts*, *Garwood v. Paynter*, 72 L. J. Ch. 208; [1903] 1 Ch. 236.

Sub-s. (2). In case of a dissolution of the partnership, whether as respects all the partners, or as respects the

assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and for the purpose of ascertaining that share, to an account as from the date of the dissolution.

The mortgagee is entitled to an inquiry of what the mortgagor's share consisted at the date of dissolution, irrespective of any agreement between the partners for valuing and dealing with the share as between themselves, and an account of all dealings and transactions between the partners as from that date. *Watts v. Driscoll*, 70 L. J. Ch. 157; [1901] 1 Ch. 294.

Partners having a power of pre-emption over a mortgaged share of partnership assets are necessary parties to a foreclosure action. *Redmayne v. Forster*, (1876) 35 L. J. Ch. 847; 2 Eq. 467.

The following persons having partial interests in mortgaged property can redeem and are necessary parties to actions for foreclosure :—

Owners of
partial
interests.

(i.) Jointress. *Howard v. Harris*, (1681) 1 Vern. 33; *Brend v. Brend*, (1688) 1 Vern. 213; *Smithett v. Hesketh*, (1890) 59 L. J. Ch. 567; 44 C. D. 161.

(ii.) Dowress. *Dawson v. Bank of Whitehaven*, (1877) 46 L. J. Ch. 884; 6 C. D. 218; *Meek v. Chamberlain*, (1881) 51 L. J. Q. B. 99; 8 Q. B. D. 31.

(iii.) Tenant by the curtesy. *Jones v. Meredith*, (1739) Bunb. 346; *Casborne v. Scarfe*, (1737) 1 Atk. 603; *Ravald v. Russell*, (1830) Younge, 9; *Rafety v. King*, (1836) 1 Keen, 601.

(iv.) Persons entitled in default of appointment, where a mortgage is made in execution of a power. *Innes v. Jackson*, (1809) 16 Ves. 367.

The reconveyance to a person who has a partial interest in the mortgaged property will be subject to the equities of redemption in the other persons interested. *Pearce v. Morris*, *supra*.

Where an equity of redemption is reserved "to A. and B. and their heirs, or to either of them," both must be parties to an action of redemption or foreclosure. *Hill v. Edmunds*, (1852) 5 De G. & S. 603.

Heir. When real estate is mortgaged and the mortgagor dies intestate, the heir is a necessary party to redemption. *Catley v. Sampson*, (1864) 34 L. J. Ch. 96.

Devisee. The devisee, whether in trust or beneficially, of the mortgagor is a necessary party in respect of so much of the equity of redemption as has been devised to him; and the heir in respect of what he takes by descent. But, if the whole equity be devised, the heir having no interest is not a proper party either to a suit by the devisee to redeem or by the mortgagee to foreclose.

In a foreclosure action, against the alleged eldest son and heir-at-law of an equitable mortgagor, an order for sale was made. It was then discovered that the heirship could not be proved, and the judgment was consequently set aside, and the action was dismissed. *Lancaster Banking Co. v. Cooper*, (1878) 9 C. D. 594.

Personal
representative of
mort-
gagor.

The personal representative of a mortgagor is a necessary party to foreclosure and redemption of realty, until he has divested himself of the property, for where real estate is vested in any person without a right in any other person, to take by survivorship, it, on his death, notwithstanding any testamentary disposition, devolves to or becomes vested in his personal representatives or representative from time to time as if it were a chattel real. Land Transfer Act, 1897 (60 & 61 Vict. c. 65).

The personal representative of a mortgagor is a necessary

party to redemption or foreclosure of personalty, except in the case of a term of years created by a tenant in fee by way of mortgage. *Bradshaw v. Outram*, (1806) 13 Ves. 234.

In such a case, it was held that the purpose of making the mortgagor's real assets available for payment of his debts did not give his personal representative such an interest as entitled him to redeem. *Tubby v. Tubby*, (1845) 2 Coll. 136.

The personal representative of a mortgagor can redeem real and personal property if these have been mortgaged to secure the same debt. Where the personal representative claims a beneficial interest in the mortgaged land and the heir cannot be found the Court may allow the personal representative to redeem mortgaged land. *Fray v. Drew*, (1865) 13 W. R. 367; *Hall v. Heward*, (1886) 55 L. J. Ch. 604; 32 C. D. 430.

An administrator *de bonis non* of the mortgagor can redeem a mortgage on leasehold property left unredeemed by a deceased administrator. *Skeffington v. Budd*, (1842) 9 Cl. & F. 219.

Apart from the Land Transfer Act, 1897, the personal representative of a mortgagor is not a necessary party to redemption or foreclosure of realty (*Wynne v. Styan*, (1847) 2 Ph. 303), unless:—

- (i.) In redemption the plaintiff (a) alleges that the mortgagee has received more than payment in full (*Baker v. Wetton*, (1845) 9 Jur. 98); or (b) claims that the mortgage debt should be paid out of the personalty in exoneration of the realty, in spite of Locke King's Acts. *Faulkner v. Daniel*, (1843) 10 L. J. Ch. 33; 3 H. 211.
- (ii.) In foreclosure the mortgagee prays relief against the personal estate, as by claiming the costs of a

renewal of leaseholds for lives, under a covenant in the mortgage deed (*Gregson v. Hindley*, (1848) 7 Jur. 248); or payment of the mortgage debt under the covenant to pay. *Duncombe v. Hansley*, (1720) 3 P. Wms. 833; *Daniel v. Skipworth*, (1787) 2 Bro. C. C. 154.

- (iii.) In both redemption and foreclosure if conversion has taken place, as where the mortgage was in the form of a conveyance upon trust to sell and, out of the proceeds, to pay debts and to hand the surplus (if any) to the mortgagor (*Christophers v. Sparke*, (1820) 2 J. & W. 223); or, since the mortgage there has been a conveyance by the mortgagor upon trust to sell and, out of the proceeds, to pay debts and to hand the surplus (if any) to the mortgagor. *Griffith v. Ricketts*, (1849) 7 H. 299.

The principle is that where the mortgagee seeks only to foreclose the equity of redemption he need only make him a party that has the equity of redemption. *Duncombe v. Hansley*, *supra*.

Legatees
having a
charge.

Legatees having a charge on the land can redeem to protect their legacies. *Faulkner v. Daniel*, *supra*. They are necessary parties if their charge is paramount to the mortgage: thus, where land was devised to A. charged with a legacy to C., C. was held to be a necessary party to an action for foreclosure of a mortgage created by A. *Chappell v. Rees*, (1851) 1 D. M. & G. 393. Where their charge is only on the equity of redemption it is not clear that they are necessary parties, unless the right of redemption is denied, as when a mortgagee resists redemption on the ground that the estate has become absolute through the operation of the Statute of Limitations. *Batchelor v. Middleton* (1847) 6 H. 75; *Greenwood v. Rothwell*, (1844) 7 B. 279.

The presence of a person appointed under R. S. C., Ord. XVI. r. 46, to represent a mortgagor's estate in the absence of a legal personal representative may, in the discretion of the Court, justify such an order being made in an action of redemption as could have been made if a duly constituted legal personal representative had been a party; but probably not in a foreclosure action unless:—

- (1) The person so appointed happened to have in his possession moneys of the mortgagor sufficient to redeem. *Mills v. Jennings*, (1880) 13 C. D. 639; *Francis v. Harrison*, (1889) 59 L. J. Ch. 248; 43 C. D. 183; *Aylward v. Lewis*, [1891] 2 Ch. 81.
- (2) The mortgaged property is a debt from a third person, as a policy of insurance, much less in amount than the mortgage debt, and the mortgagor's estate is insolvent. *Curtius v. The Caledonian Co.*, (1881) 51 L. J. Ch. 80; 19 C. D. 534.

In the absence of a personal representative.

In a case where one of the defendants in a foreclosure action (the second mortgagee), who had not entered an appearance, died after the completion of the chief clerk's certificate, but before the period fixed for redemption had expired, the Court under this rule appointed his widow to represent the estate for the purposes of the action, and ordered that she might be served with the order and not made a party. *Neal v. Barrett*, W. N. (1887) 88.

A committee in lunacy, subject to the approval of the Court, and a next friend of a person of unsound mind not so found, have the same rights of redemption and foreclosure as the lunatic or person of unsound mind.

In foreclosure, the lunacy of the mortgagor does not affect the remedies of the mortgagee, but the committee must be substituted in place of the lunatic, or a guardian *ad litem* in place of a lunatic without a committee. *Beall*

In lunacy.

v. Smith, (1873) 43 L. J. Ch. 245; 9 Ch. 85; Annual Practice, R. S. C., Ord. XVI. r. 17.

In foreclosure of an equitable mortgage a lunatic mortgagor can be divested of the legal estate under the Lunacy Act, 1890, s. 135 (53 & 54 Vict. c. 5), and see Rules in Lunacy, 1892, 57 (b).

Original mortgagees after assignment.

The original mortgagee and intermediate mortgagees after absolute assignment are unnecessary parties to actions of foreclosure and redemption. If, however, they have been in possession, they remain liable to account on the footing of wilful default, even after absolute assignment. *Hall v. Heward*, (1886) 55 L. J. Ch. 604; 32 C. D. 430; *Prytherch v. Williams*, (1889) 59 L. J. Ch. 79; 42 C. D. 590.

They are necessary parties if they have been in possession, and the mortgagor alleges receipts in excess of the mortgage debt and claims repayment.

But they are not necessary parties, although they have been in possession, if there is no claim for repayment and receipts are alleged and used only to reduce the debt. "Where there has been an assignment without the previous authority of the mortgagor, or his declaration that so much is due, it is enough to make that man a party who has contracted to stand in the place of the original mortgagee and all assignees till the title was got in by himself." *Chambers v. Goldwin*, (1802) 9 Ves. 269.

But the original mortgagee should be made a party when the mortgagor seeks to enforce against the assignee an equity derived not from receipts, but from fraud by the original mortgagee. *Bickerton v. Walker*, (1885) 55 L. J. Ch. 227; 31 C. D. 151.

Sub-mortgages.

After assignment, by way of sub-mortgage, the original mortgagor, sub-mortgagor, and sub-mortgagee are all necessary parties to foreclosure and redemption, unless:—

- (1) The action relates only to the derivative mortgage, when the original mortgagor is an unnecessary party. *Burrell v. Smith*, (1869) 38 L. J. Ch. 382; 7 Eq. 399.
- (2) The interest of the sub-mortgagor is wholly gone, in which case he is not a necessary party. *Hobart v. Abbot*, (1731) 2 P. Wms. 643; *Norrish v. Marshall*, (1821) 5 Mad. 475; as to sub-mortgages, see p. 127.

If the interest in the mortgage debt becomes separated from the estate in the mortgaged property, it is necessary to make parties in foreclosure and redemption:—(1) the person entitled to receive the mortgage debt whether beneficially or on trust; (2) the person who holds the mortgaged property. *Smith v. Chichester*, (1842) 2 Dr. & W. 398.

Devolution of mortgaged property.

An estate of inheritance, vested by way of mortgage in any person solely, on his death devolves, notwithstanding any testamentary gift to his personal representatives, as if the same were a chattel real. Conveyancing Act, 1881, s. 30.

In case of a specific bequest of a mortgage debt, the legatee, and executor or administrator are necessary parties; unless the testator has by his will made the legatee of a mortgage debt, secured on an estate of inheritance, an executor for that special purpose.

When the mortgage debt has been settled, sect. 36 of the Conveyancing Act, 1881, makes the receipt of trustees an effectual discharge for all moneys payable to them; it is therefore unnecessary to make the beneficiaries of the mortgage money parties in a redemption or foreclosure action; the trustees are alone necessary parties. *Bartle v. Wilkin*, (1836) 8 S. 238. In foreclosure, if the trustees differ as to the propriety of calling in the mortgage-money,

Settlement of mortgage debt.

the beneficiaries ought to be added, in order that they may be able to be heard on a matter which materially concerns them. *Butler v. Butler*, (1877) 7 C. D. 116.

Joint
tenants
and
tenants in
common.

Joint tenants and tenants in common can redeem and suffer foreclosure of their shares without reference to the other joint owners.

The concurrence of all joint owners of the equity of redemption is necessary in foreclosure or redemption of a mortgage on the entirety. *Waugh v. Land*, (1815) G. Cooper, 130; *Bolton v. Salmon*, [1891] 2 Ch. 48.

One of two joint tenants to whom a property has been conveyed as a security for one sum advanced, by the mortgagees in separate shares, can foreclose without the consent of the other on making him a co-defendant. *Davenport v. James*, 7 H. 249. In this case a term of years was conveyed to two as joint tenants to secure a sum of 2,500*l.*, of which it was alleged, and not denied, that 1,500*l.* was paid by one and 1,000*l.* by the other.

Joint
mort-
gagee.

One of two joint mortgagees to whom the mortgage-money belongs jointly can foreclose without the consent of the other, making him a co-defendant if he is within the jurisdiction. If the objection of the other is against foreclosure, and not simply against being a co-plaintiff, the question whether there is to be foreclosure or not must be decided by the Court. *Luke v. South Kensington Hotel Co.*, (1879) 48 L. J. Ch. 361; 11 C. D. 121; *Webb v. Jonas*, (1888) 57 L. J. Ch. 671; 39 C. D. 660.

Distinc-
tion in
case of
equitable
mortgage.

The effect of a decree of foreclosure against the wish of a co-mortgagee is different in the case of a legal mortgage from what it may be in the case of an equitable mortgage. In the former case foreclosure merely releases the equity of redemption, but in the case of an equitable mortgage

it may provide for the conveyance to a mortgagee of property which it is possible he has no wish or intention to make his own, although he accepted a charge on it. *Elias v. Continental Oxygen Co.*, 66 L. J. Ch. 273; [1897] 1 Ch. 511; *Sadler v. Worsley*, [1894] 2 Ch. 170.

CHAPTER XIV.

COSTS OF A MORTGAGEE.

Nature of
the trans-
action.

THE nature of the transaction is that all expenses are borne by the mortgagor. *Hewitt v. Toosemere*, (1851) 9 H. 449.

Or, more correctly speaking, all costs, charges, and expenses properly incurred by the mortgagee in relation to the mortgaged property are borne by the mortgaged property; for it is doubtful if there is an implied contract by a mortgagor to a mortgagee to pay costs so as to found an action of debt. The right of the mortgagee is to add to his mortgage debt proper costs and expenses. *Ex parte Fewings, Re Sneyd*, (1883) 25 C. D. 338.

Prelimi-
nary costs.

An express promise to the mortgagee to pay his costs gives no right of action or lien to the mortgagee's solicitor against the mortgagor. *Pratt v. Vizard*, (1893) 5 B. & Ad. 808. In the absence of a special bargain expenses connected with the finding of the money by the lender from the sale of stock, or of a valuation of the property with a view to a loan are not allowed in taking the mortgage accounts. *Re Blakesley*, (1863) 32 B. 379; *Field v Hopkins*, (1890) 44 C. D. 524; *In re Gray*, 70 L. J. Ch. 133; [1901] 1 Ch. 239.

Surveys of the land, perusal of abstracts, examination of deeds, preparation and engrossment of the mortgage deed, are costs which the mortgagee may deduct from the amount of his advance, or he may, when the transaction is completed, treat these expenses as simple contract debts, and sue the mortgagor for them. *Gregg v. Slater*, (1856) 25

L. J. Ch. 440; *Rigley v. Daykin*, (1828) 2 Y. & J. 88; *Wilkinson v. Grant*, (1856) 25 L. J. C. P. 233.

The mortgagee has no power to add such costs to his mortgage debt and charge them on the property. *Wales v. Carr*, 71 L. J. Ch. 483; [1902] 1 Ch. 860.

The costs, charges, and expenses which a mortgagee properly incurs by virtue of his security, and in defence of the mortgaged property or himself as mortgagee, must be paid by the mortgagor as a term of redemption, but do not constitute a personal liability. The expenses incident to the mortgage transaction, such as the preparation of the mortgage deed, do not become a debt until the transaction is completed and are not then changed into secured debts charged upon the property. *Wales v. Carr*, *supra*.

An agreement (1) "to pay fair and reasonable expenses in ascertaining the value of the property" is not enforceable in a case where a proposed mortgage goes off through the default of the proposed mortgagee (*St. Leger v. Robson*, (1831) 9 L. J. K. B. 184); (2) "to pay all costs and charges incurred in investigating the title" does not cover interest on money lying idle while the borrower tried to remedy a defect in his title (*Sweetland v. Smith*, (1833) 2 L. J. Ex. 190); (3) "to pay the expenses of the lender's solicitors" does not cover a sum of 10*l.* charged to the intended lender for a remittance of the money. *Re Blakesley*, *supra*.

Special
Agree-
ments.

When a proposed mortgage goes off, it would seem that, in the absence of some special agreement, there is no legal obligation on the mortgagor to pay preliminary expenses of the mortgagee.

When
mortgage
goes off.

The Court, when it directs the raising of money by way of mortgage, will follow the ordinary practice, and allow on petition, a proposed mortgagee his preliminary costs, if the mortgage has gone off through no default of his.

Craggs v. Gray, (1866) 35 B. 166; *Nicholson v. Jeyes*, (1853) 22 L. J. Ch. 833.

Solicitor's
lien.

When a mortgage is completed, a solicitor who has acted for both mortgagor and mortgagee cannot claim against the mortgagee a lien upon the title deeds for costs due to him from the mortgagor. *Re Snell*, (1877) 46 L. J. Ch. 627; 6 C. D. 105; *In re Mason and Taylor*, (1878) 48 L. J. Ch. 193; 10 C. D. 729; *Macfarlane v. Lister*, (1887) 57 L. J. Ch. 92; 37 C. D. 88.

Unless the transaction were of such a nature that the mortgagee had no right to the possession of the deeds. *Brunton v. Electrical Engineering Corporation*, 61 L. J. Ch. 256; [1892] 1 Ch. 434.

Against
mortgagor
on re-
demption.

The solicitor's lien is merely a right to keep back from his client the deeds and papers which he holds as solicitor, until his bill of costs is paid. When, therefore, the mortgage money is paid, and a reconveyance or transfer executed, the mortgagee's solicitor cannot retain the deeds and papers as against the mortgagor, even for costs due to the solicitor from the mortgagee for work which as between mortgagor and mortgagee would be payable by mortgagor. *Ogle v. Storey*, (1833) 2 L. J. K. B. 110; 4 B. & A. 735; *Wakefield v. Newbon*, (1844) 6 Q. B. 276; *Re Llewellyn*, 60 L. J. Ch. 732; [1891] 3 Ch. 145.

Costs of
action.

Both in foreclosure and redemption actions, the mortgagee is entitled to the costs of the suit, and also to all costs and expenses properly incurred by him in reference to the mortgaged property for its protection and preservation, recovery of the mortgage money, or otherwise relating to questions between him and the mortgagor, and to add the amount to the sum due to him on his security for principal and interest. *National Provincial Bank of England v. Games*, (1886) 55 L. J. Ch. 576; 31 C. D. 593; see also *Godfrey v. Watson*, (1747) 3 Atk. 517; *Cotterell v.*

Stratton, (1872) 42 L. J. Ch. 417; 8 Ch. 295; *Cottrell v. Finney*, (1874) 43 L. J. Ch. 562; 9 Ch. 541; *Dryden v. Frost*, (1897) 8 L. J. Ch. 235; 3 My. & C. 670.

A mortgagee is only entitled to party and party costs of actions of redemption or foreclosure, or of an action in which the mortgagee asks only for sale. *Re Queen's Hotel, Cardiff, Ltd.*, 69 L. J. Ch. 414; [1900] 1 Ch. 792. Party and party.

A decree in an administration action under which eventually the mortgage is paid in full, does not make it unreasonable to commence a foreclosure action. *Brookshank v. Higginbottom*, (1862) 31 B. 35. Administration action already commenced.

The costs of an action to foreclose two mortgages not subject to consolidation are borne rateably by the two properties, and so presumably in a similar action for redemption. *De Caux v. Skipper*, (1886) 31 C. D. 635. Costs as affected by consolidation.

A mortgagee will be allowed to add to his charge his costs of a successful appeal. *Addison v. Cox*, (1872) 42 L. J. Ch. 291; 8 Ch. 76. Costs of appeal.

The costs of a trustee for the mortgagee necessarily added in a foreclosure action, must be paid in the first instance by the plaintiff, and then added to his charge. *Browne v. Lockhart*, (1840) 10 S. 426. Of trustee for mortgagee.

When the action takes the double form of an action on the covenant and an action for foreclosure, the order for personal payment should include only so much of the costs as would have been properly incurred had the action been one on the covenant only. *Farrer v. Lacy, Hartland & Co.*, (1885) 55 L. J. Ch. 149; 31 C. D. 42; *Bissett v. Jones*, (1886) 55 L. J. Ch. 648; 32 C. D. 635. Of action on the covenant.

The ordinary course is that the costs of a foreclosure action are charged against the mortgagor in account. Therefore, if the equity of redemption is foreclosed, and is less in value than the amount due for principal, interest,

and costs, the mortgagee bears his own costs, since he can sue for any deficiency in principal and interest, but not for costs. *Re Sneyd*, (1883) 53 L. J. Ch. 545; 25 C. D. 398.

On County
Court
scale.

In a foreclosure action for 65*l.* where both parties lived at the same place, the costs were taxed on the County Court scale. *Crozier v. Dowsett*, (1885) 55 L. J. Ch. 210; 31 C. D. 67. *Secus*, where they live at different places. *Scotto v. Heritage*, (1866) 36 L. J. Ch. 123; 3 Eq. 212; *Brown v. Rye*, (1874) 17 Eq. 343.

Interest
on costs.

Interest on the costs of action is not charged against a mortgagor, unless by the judgment the costs are charged on or added to the mortgagee's security. Costs which are so charged or added carry interest at 4 per cent. from the date of such order. *Lippard v. Ricketts*, (1872) 41 L. J. Ch. 595; 14 Eq. 291; *Eardley v. Knight*, (1889) 41 C. D. 587; *Taylor v. Roe*, 63 L. J. Ch. 282; [1894] 1 Ch. 413.

Costs of
plaintiff
failing to
redeem.

A redemption action is dismissed with costs against a plaintiff failing to redeem. This rule applies whenever a plaintiff makes default in redeeming, as in a foreclosure action where it was held that the plaintiff was first and fifth mortgagee, and therefore as last mortgagee must redeem all prior mortgages, or pay all the costs of the action. *Mutual Life Assurance Soc. v. Langley*, (1886) 32 C. D. 475.

Just al-
lowances.

The costs and expenses properly incurred by a mortgagee in reference to the mortgaged property for its protection and preservation, recovery of the mortgage-money or otherwise relating to questions between him and the mortgagor are either just allowances which, in taking an account directed by any judgment or order will be allowed without any direction for that purpose (R. S. C. Ord. XXXIII. r. 8, re-enacting Consolidated Ord. XXIII. r. 16) or other costs and expenses which, in taking an

account, will be allowed if special grounds are shown. *Bolingbroke v. Hinde*, (1884) 53 L. J. Ch. 704; 25 C. D. 795.

Prior to Consolidated Ord. XXIII. r. 16 (August 22, 1859), just allowances were not given unless there was a special direction to that effect in the judgment. In some of the earlier cases it is difficult to know if the mortgagees were disallowed the disputed items on the ground that they were not just allowances, or because the decree in the particular instance was silent as to just allowances. *Wilkes v. Saunion*, (1877) 47 L. J. Ch. 150; 7 C. D. 188.

The usual form of judgment in a foreclosure action directs an account of "the costs of this action." *Farrer v. Lacy, Hartland & Co.*, *supra*; *Blackford v. Davis*, (1869) 4 Ch. 304. Usual order.

To obtain costs generally beyond the costs of the action and just allowances special ground must be shown and the judgment taken in the form of "costs, charges and expenses, properly incurred in respect of the mortgage security, not being costs of this action." *Rees v. Metropolitan Board of Works*, (1880) 49 L. J. Ch. 620; 14 C. D. 372; *Bolingbroke v. Hinde*, *supra*. Special order.

Just allowances will only be given for expenditure properly incurred and reasonable in amount. A mortgagee cannot charge against a mortgagor the costs of doing anything in an expensive manner which might reasonably have been done in a less expensive manner.

In *Wilkes v. Saunion*, *supra*, Jessel, M.R., referred to the following cases in which "just allowances" were held to include:—executors' charges and expenses (*Fearns v. Young*, (1804) 10 Ves. 184); payments by them in discharge of legacies (*Nightingale v. Lawson*, (1784) 1 Cox, 29); deduction for dower out of rents receivable by a widow trustee (*Graham v. Graham*, (1749) 1 Ves. Sen. Some instances.

262); expenses of managing and carrying on a partnership business (*Brown v. De Tastet*, (1821) Jac. 284; *Cook v. Collingridge*, (1822) Jac. 607); but not to include setting off taxed costs by a solicitor accountable for rents received by him as steward or agent. *Joliffe v. Hector*, (1841) 12 S. 898.

The following are further instances of just allowances:—

- (i.) Necessary repairs but not permanent improvements, also expenses, costs, and payments which the mortgage contract provides shall be paid to the mortgagee unless they are illegal, as clogging the equity of redemption. *Sandon v. Hooper*, (1843) 6 B. 246; on appeal, 14 L. J. Ch. 121; *Tipton Green Co. v. Tipton Moat Co.*, (1877) 42 L. J. Ch. 152; 7 C. D. 192; *Shepard v. Jones*, (1882) 21 C. D. 469.
- (ii.) Under a clause in a mortgage of a sheep run authorizing the mortgagee, in default of the mortgagor, to pay and add to his security “licence, fee, or rent charges, fines, penalties, and assessments,” advances for payment of government rent due, and for scab licences for sheep, but not the cost of sheep-wash. *Fenton v. Blackwood*, (1874) 5 P. C. 167.
- (iii.) Sums reasonably expended by a mortgagee in the exercise of his powers, even though they may have proved abortive. *Farrer v. Lacy, Hartland & Co.*, *supra*.
- (iv.) Or in reasonable precautions for his own protection, as in preparing copies of drafts (*Re Wade and Thomas*, (1881) 50 L. J. Ch. 601; 17 C. D. 348); but when the necessity for a precaution arises from some act of the mortgagee he must pay for it, as when three distinct mortgages

Costs of
exercise
of powers.

were conveyed by one deed and the mortgagee desired a covenant to produce from a mortgagor who redeemed. *Capper v. Terrington*, (1844) 13 L. J. Ch. 239.

- (v.) Expenses incurred in taking and holding possession of a mortgaged ship, advertising it for sale, and effecting insurances when seizure of the ship was the only way of recovering the money. *Wilkes v. Saunion*, *supra*.

Of holding possession.

It is doubtful if costs incurred by a mortgagee in assessing the value of mortgaged property taken by a public body under statutory powers are chargeable as just allowances in priority to subsequent mortgages. *Rees v. Metropolitan Board of Works*, *supra*.

Of assessing value on compulsory sale.

The expenses of a sale rescinded by a mortgagee in order to sue the mortgagor after final foreclosure will not be allowed. *White v. Gudgeon*, (1862) 30 B. 545; *Haynes v. Haynes*, (1857) 3 Jur. N. S. 504.

Of sale rescinded by mortgagee.

Conveyancing Act, 1881, s. 19, sub-s. (1).—A mortgagee, where the mortgage is made by deed, has “a power at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property in addition to the mortgage money and with the same priority, and with interest at the same rate as the mortgage money.”

Insurance.

The amount and application of the insurance money are regulated by sect. 23 of the same Act.

The law as to the right to have premiums on a mortgaged life policy repaid, is summed up in *In re Leslie*, (1889) [52 L. J. Ch. 762; 23 C. D. 552. In four cases

Premiums.

only does a person, not the sole beneficial owner, obtain a lien for premiums which he pays :—(1) by contract with the beneficial owner ; (2) by reason of the right of trustees to an indemnity for money expended by them in preserving the trust property ; (3) by subrogation to the rights of trustees of some person who, at their request, has advanced money to preserve the property ; and (4) by reason of the right of a mortgagee to add to his security money expended in preserving the mortgaged property. *Falche v. Scottish Imperial Insurance Co.*, (1886) 56 L. J. Ch. 707 ; 34 C. D. 234 ; *Earl of Winchilsea's Policy Trusts*, (1888) 58 L. J. Ch. 20 ; 39 C. D. 168.

Renewal
of lease-
holds and
land tax.

The expense of renewals of leases, fines on admissions to copyholds, and redemption of land tax with interest, will be allowed.

If a leasehold estate, held for lives, is mortgaged, and there is no covenant on the part of the mortgagor that he will procure the lives to be filled up, the mortgagee cannot compel him to do it, but must pay the expense of renewing, and then reimburse himself by adding it to the principal of the mortgage, and it shall carry interest. *Lacon v. Mertins*, (1856) 3 Atk. 4.

Costs of
defence
of mort-
gagee's
title.

A mortgagee is allowed all costs incurred in fairly and reasonably maintaining his title at law. *Dryden v. Frost*, (1837) 8 L. J. Ch. 235 ; 3 My. & Cr. 670 ; *Ellison v. Wright*, (1827) 3 Russ. 458 ; *Wilkes v. Saunton*, *supra*. Such as the costs incurred (a) in resisting the claim of the true owner of some bales, wrongfully represented by the mortgagor as his property and included in the mortgage, but not the costs of an unsuccessful appeal (*Ex parte Carr*, (1879) 48 L. J. Bank. 69 ; 11 C. D. 62) ; (b) in establishing the mortgagor's title against his heir who disputed it. *Ramsden v. Langley*, (1705) 2 Vern.

536. These costs are not necessarily limited to taxed costs.

In the following case, the costs of unsuccessful proceedings have been allowed:—(1) costs incurred in an action of ejectment which failed through no fault of the mortgagee; (2) costs paid to the defendants in that action. The difference between the taxed costs and the total disbursements in the subsequent successful action “would probably have been allowed” if asked for. *Horlock v. Smith*, (1844) 1 Coll. 287.

Of unsuccessful proceedings.

The cost of obtaining administration to the mortgagor will be allowed. *Ramsden v. Langley*, *supra*; *Hunt v. Fownes*, (1803) 9 Ves. 70; *Lomax v. Hide*, (1690) 2 Vern. 185.

Administration to mortgagor's estate.

The representative of a mortgagor, who has taken out letters of administration without an express request from the mortgagee, is not entitled to be paid out of the mortgaged property the expenses so incurred, though the letters of administration were necessary, in order to perfect the title of the mortgagee. *Saunders v. Dunman*, (1878) 47 L. J. Ch. 338; 7 C. D. 825; *Re Leslie*, *supra*.

The costs of obtaining a stop order may be allowed, but not without an express direction of the Court. *Waddilove v. Taylor*, (1848) 6 H. 307.

Costs of stop order.

In an action to foreclose a mortgage by deposit of title deeds, accompanied by a memorandum by which the mortgagor agreed to execute a legal mortgage of his property at the request of the mortgagee, the following costs were allowed:—

National Provincial v. Games.

- (1) Costs of an action in the Queen's Bench Division for recovery of the debt.
- (2) Costs of correspondence with a surety who had given a promissory note for part of the debt.

- (3) Costs of the preparation of the legal mortgage, and the expense of such inspection of the title deeds as was necessary for preparing it; but not the expenses of an investigation of the mortgagor's title.
- (4) Costs of correspondence with the mortgagor as to the legal mortgage. *National Provincial Bank of England v. Games*, (1886) 55 L. J. Ch. 576; 31 C. D. 582.

It seems doubtful whether these costs were allowed as "just allowances," or as the subject of a special application to the Court; see p. 269.

Convey-
ance of
legal
estate.

The following are the rules relating to the costs of the conveyance of the legal estate:—

- (1) In a legal mortgage, the mortgagee can deduct all costs of the conveyance from his advance; or he can recover them from the mortgagor personally, but he cannot add them to his charge. *Wales v. Carr*, 71 L. J. Ch. 483; [1902] 1 Ch. 860.
- (2) When the legal estate is conveyed in pursuance of a contract contained in an equitable mortgage, the costs are a charge on the property. *National Provincial Bank of England v. Games*, *supra*.
- (3) After final foreclosure, the costs of procuring a conveyance are borne by the mortgagee. *Pryce v. Bury*, (1853) 2 Dr. 41.

Depriva-
tion of
costs.

For misconduct or extravagance, a mortgagee can be punished by the Court (1) by deprivation of his own costs of the suit in a redemption or foreclosure action; or (2) in addition to deprivation of his own costs, he may be ordered to pay the mortgagor's costs by allowing them to be set off against the sum due to him under the mortgage; or (3) he may be ordered personally to pay the mortgagor's costs.

Though the Court has jurisdiction to make such orders, it will require a very strong case to justify a personal order to pay mortgagor's costs in a redemption action, for such an action is useless unless the mortgagor redeems, and then they can be paid by deduction from the mortgage debt. *Cotterell v. Stratton*, (1872) 42 L. J. Ch. 417; 8 Ch. 295.

The mortgagor or his trustee in bankruptcy can tax the mortgagee's solicitor's bill of costs incurred in selling the property under a power of sale. *Re Allingham*, (1886) 55 L. J. Ch. 800; 32 C. D. 86. Taxation by mortgagor.

A mortgagor liable to pay a mortgagee's costs can, under s. 38 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), obtain a third party order for taxation of the bill of the mortgagee's solicitor. The mortgagor cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third party order to tax. *In re Gray*, 70 L. J. Ch. 133; [1901] 1 Ch. 239; *In re Longbottam & Sons*, 73 L. J. Ch. 681; [1904] 2 Ch. 152, *Cohen v. Cohen*, 74 L. J. Ch. 517; [1905] 2 Ch. 137. Liability under third party order.

Costs are not refused of a mortgagee for an over-estimate of his rights, or of the amount due to him. *Loftus v. Swift*, (1806) 2 Sch. & Lef. 642; *Alexander v. Simms*, (1855) 20 B. 123; *Cotterell v. Stratton*, *supra*; *Smith v. Watts*, (1882) 52 L. J. Ch. 209; 22 C. D. 5. Costs not refused for over-estimate of rights.

It is only in a rare case that costs ought to be given against a mortgagee who brings forward a case which is fairly open to argument. *Bird v. Wenn*, (1886) 55 L. J. Ch. 722; 33 C. D. 215. Or in a *bonâ fide* case.

It is a circumstance in his favour that he has brought the matter before the Court with a reasonable degree of economy, and without hardship to the mortgagor. *Cotterell v. Finney*, (1874) 43 L. J. Ch. 562; 9 Ch. 541.

Costs a
matter of
contract.

The right of a mortgagee to his costs of a redemption or foreclosure suit is a matter of contract, and not in the discretion of the Court unless the mortgagee has been guilty of some misconduct.

O. 65, r. 1. Subject to the provisions of the Acts and of these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the judge. Provided that nothing herein contained shall deprive a mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division.

The Judicature Act, 1873, enacts that no order made by the High Court "as to costs only which by law are left to the discretion of the Court" is to be subject to an appeal, except by leave.

Orders interfering with a mortgagee's right to costs are subject to appeal by the mortgagee. *Turner v. Hancock*, [1892] 51 L. J. Ch. 517; 20 C. D. 303.

A mortgagor cannot appeal if a judge, in spite of charges of misconduct, refuses to deprive a mortgagee of his costs. It is no part of the contract between the mortgagor and mortgagee that the mortgagee shall lose his costs if he behaves improperly. If the costs are in the discretion of the judge the Court of Appeal will assume that the judge exercised his discretion, unless it is satisfied that he has not exercised his discretion, but has applied some rule which in fact excluded his discretion. Charges and expenses are not mentioned in the Act or the rule and are not matters as to which an appeal is taken away. An appeal lies by a mortgagor as to the propriety of incurring such charges and expenses. An appeal from an order for

payment of "costs, charges, and expenses" will not lie as to "costs" only if the order is right as to "charges and expenses." *Charles v. Jones*, (1886) 56 L. J. Ch. 161; 33 C. D. 80; *Downes v. Cottam*, [1893] 1 Ch. 547; *Bew v. Bew*, [1899] 68 L. J. Ch. 657; 2 Ch. 467.

A mortgagee has been deprived of his costs or even ordered to pay the mortgagor's costs under the following circumstances :—

Instances
of depri-
vation.

I. Unjust contrivances to make the estate his own.

Thornhill v. Evans, (1742) 2 Atk. 330. In this instance, the mortgagee had turned interest into principal at 5 per cent., whereas the original mortgage was at 4 per cent., charged double interest for the last six months, and compelled the mortgagor to give him the stewardship of the manor. *Cranstown v. Johnston*, (1796) 3 Ves. 170; 5 Ves. 277.

Unjust
defences
and
fraudulent
contri-
vances.

II. Oppression and misconduct. *Rider v. Jones*, (1843) 2 Y. & C. 329.

A solicitor who, having the conduct of a sale, bought the property in an assumed name at half the price which it fetched on a sale subsequently ordered by the Court, was compelled to pay the costs of the application to the Court. *Sidny v. Ranger*, (1841) 12 S. 118.

III. Using his position as mortgagee to vexatiously evade payment of damages for breach of a covenant for quiet enjoyment. *Thornton v. Court*, (1853) 22 L. J. Ch. 361; 3 D. M. & G. 293.

IV. Unfounded claim to the equity of redemption, and false denial that the debt had been satisfied. Here the mortgagee was ordered to pay (1) costs occasioned by his claim; (2) costs subsequent to answer; (3) interest at 4 per cent. on the balances in his hand since the mortgage was

paid off. *Montgomery v. Calland*, (1844) 14 S. 79; *The Incorporated Soc. v. Richards*, (1841) 1 Dr. & Wor. 158; *Hall v. Heward*, (1886) 55 L. J. Ch. 604; 32 C. D. 430.

A mortgagee, who in a redemption action sets up and fails to prove an absolute title to the mortgaged property, and is then found to have been at the date of the action overpaid as mortgagee, will not only not be allowed his costs of action, but may have costs given against him. *National Bank of Australasia v. United Hand-in-Hand* (1879) 4 A. C. 391.

Mortgagees refused to allow redemption, except on terms of tacking to their first mortgage another incumbrance which would have exhausted the value of the estate, and practically deprived the second mortgagee of redemption altogether. It was held that this claim, though unfounded, was not unreasonable or vexatious, and that therefore justice would be done by depriving the mortgagees of the costs caused by this claim. They were not ordered to pay costs.

In this case the mortgagors did not make an actual tender, nor did they pay into Court under Ord. XXII. r. 3, but were continually ready to pay, if their view of the right of redemption (which view the Court ultimately held to be correct) was admitted. This conduct was held insufficient to amount to tender and unconditional readiness to pay, and interest was allowed to the mortgagee until the date of payment of the principal. *Kinnaird v. Trollope*, (1888) 58 L. J. Ch. 556; 42 C. D. 610.

V. A wrongful claim by a solicitor mortgagee for certain profit costs, in which case the mortgagor paid principal, interest, and costs; the mortgagee was condemned in all costs incurred

subsequent to the payment. *Gregg v. Slater*, (1856) 25 L. J. Ch. 440.

- VI. Refusing to reconvey in order to benefit another incumbrancer (*Tomlinson v. Gregg*, (1866) 15 W. R. 51), or in order to obtain payment of an unregistered second charge (*Credland v. Potter*, (1874) 44 L. J. Ch. 169; 10 Ch. 8); or owing to quarrels among the mortgagees, and an unreasonable claim by one of them to receive the interest beneficially, and neglect by another mortgagee to attend at time and place fixed for payment. *Cliff v. Wadsworth*, (1843) 2 Y. & C. 598.
- VII. After receipt of all that is due, either a refusal to give accounts, when he has been in possession, or remaining in possession. *Detillin v. Gale*, (1802) 7 Ves. 585; *Tanner v. Heard*, (1857) 23 B. 555; *Sandon v. Hooper*, (1843) 6 B. 246; *Powell v. Trotter*, (1861) 1 Dr. & Sm. 388; *Ashworth v. Lord*, (1877) 57 L. J. Ch. 230; 36 C. D. 544.

Improper
refusal to
reconvey.

Refusal
to give
accounts
after re-
ceipt of
all due.

A mortgagor obtained a decree for redemption, and died without prosecuting it; the mortgagee then obtained a decree for foreclosure. On an account being taken, it was found that a balance was due to the mortgagee at the date of the first decree, and none at the date of the second; the mortgagee was given the costs of the first action, and ordered to pay the costs of the second. *Morris v. Islip*, (1856) 23 B. 244.

In an action for account of the proceeds of sale of mortgaged property, the mortgagee admitted by his defence that a certain sum was due from him and paid it into Court, but on taking the account a much larger sum was found due. The mortgagee was allowed none of the costs

of the account. *Charles v. Jones*, (1887) 56 L. J. Ch. 745; 85 C. D. 544.

So, if in any other way a mortgagee renders an action of redemption necessary; as, for instance, by raising against a surety who offered to redeem an erroneous claim to tack further advances made to the mortgagor. *Forbes v. Jackson*, (1882) 51 L. J. Ch. 690; 19 C. D. 615.

A mortgagee having lost the deeds, the mortgagor was held to be entitled to the costs of an action of redemption and to an indemnity, but not to compensation for the loss of the deeds. *Middleton v. Eliot*, (1847) 15 S. 581; *James v. Rumsey*, (1879) 48 L. J. Ch. 345; 11. C. D. 398.

Refusal of tender.

VIII. Refusal of a proper tender by mortgagor or puisne mortgagee, or a vexatious refusal to reconvey. *Smith v. Green*, (1844) 1 Coll. 555; *Harmer v. Priestley*, (1853) 16 B. 569; *Roberts v. Williams*, (1844) 4 H. 129; *Sentance v. Porter*, (1849) 7 H. 426; *Wilson v. Cluer*, (1841) 4 B. 214; *Hoskin v. Sincock*, (1865) 34 L. J. Ch. 435; 13 W. R. 487.

Tender.

A conditional tender is not effectual, but a tender under protest is sufficient. *Greenwood v. Sutcliffe*, 61 L. J. Ch. 59; [1892] 1 Ch. 1.

Costs of trustee of mortgaged property.

In an action of redemption, where the mortgagee was ordered to pay costs, the costs of a trustee of the mortgaged property were paid in the first instance by the plaintiff and repaid by the mortgagee. *Montgomery v. Calland*, *supra*.

Reference of accounts after charges of misconduct.

When a mortgagor has by his pleadings in an action of foreclosure or redemption, claimed that by reason of misconduct the mortgagee should pay the costs, a consent to a reference of the accounts to a Master amounts to a waiver of the charges of misconduct. If it is desired to continue the charges a direction to the Master to consider the

evidence should be included in the order. *Dunstan v. Patterson*, (1847) 2 Ph. 344.

The costs of reconveyance are borne by the mortgagor, including costs of such legal proceedings as may be necessary to obtain a reconveyance of the legal estate (*King v. Smith*, (1848) 18 L. J. Ch. 43); and the mortgagee's reasonable costs of perusing drafts and making a copy of the draft deeds of reconveyance. *Re Wade and Thomas*, (1881) 50 L. J. Ch. 601; 17 C. D. 348.

There are two exceptions—(a) additional costs caused by negligent, capricious, or unnecessary acts of the mortgagee. If the mortgagee complicates the title of the mortgaged property by mixing it in one transfer with other property, then the costs of attested copies of the deeds and of covenants to produce must be borne by the mortgagee. *Capper v. Terrington*, (1844) 13 L. J. Ch. 239; *Dobson v. Land*, (1851) 4 De G. & S. 575.

(b) The additional costs occasioned by the lunacy of the mortgagee. *Ex parte Richards*, (1820) 1 J. & W. 264; *In re Townsend*, (1847) 2 Ph. 348.

In redemption from a lunatic mortgagee the practice is that the mortgagor states to the committee that he is willing to pay off the debt and asks the committee to apply to the Court for a transfer of the legal estate under the Lunacy Act, 1890, s. 135. If the committee declines, the mortgagor may then present a summons under the Rules in Lunacy, 1892, r. 57 (b), asking that he may be allowed to pay the money into Court, for delivery out of Court of the deeds and transfer of the legal estate. *In re Wheeler*, (1852) 1 D. M. & G. 434; *In re Thomas*, (1853) 22 L. J. Ch. 858; *In re Jones*, (1876) 45 L. J. Ch. 688; 2 C. D. 70.

The mortgagors should not be served on a petition by a committee for authority to reconvey. Whether served or not

Recon-
veyance.

In lunacy.

53 Vict.
c. 5.

a mortgagor will not have his costs out of the lunatic's estate. A mortgagor does not pay the costs of a lunatic mortgagee, but he is not paid costs. *In re Phillips*, (1869) 4 Ch. 629.

Where there was no committee, on a joint petition by receiver and mortgagor, the costs of the petitioners, and of the next of kin and heir-at-law who appeared, were allowed out of the mortgage debt. *In re Biddle*, (1853) 23 L. J. Ch. 23 ; but see *In re Sparks*, *infra*.

On an application in Chancery for a vesting order under the Trustee Acts, there is no jurisdiction to give the mortgagor his costs out of the mortgage debt. *Re Stuart*, (1859) 4 D. & J. 319.

Where there is no committee, the mortgagor pays into Court the mortgage debt and interest and obtains a vesting order, each side paying their own costs. *In re Sparks*, (1877) 6 C. D. 361.

Priority
of costs.

Primâ facie, each mortgagee adds his costs to, and is paid in accordance with the priority of his security. *Johnstone v. Cox*, (1880) 19 C. D. 17.

In a priority suit puisne mortgagees need not pay the costs of those above them unless they redeem, but the Court has a discretion, and can order one or other of the claimants to pay the costs, if a case is made for it. *Harpham v. Shacklock*, (1881) 19 C. D. 207.

In this case it was held that an order that the costs of a puisne mortgagee should be paid out of the mortgaged property in priority to the principal and interest of a prior incumbrancer is subject to appeal on the ground that a mortgagee's security extends to his costs as well as to principal and interest. *Johnstone v. Cox*, *supra*.

Deficient
security.

A mortgagor or a puisne incumbrancer can be ordered to pay personally the cost of unsuccessful attempts to surcharge mortgagees in possession, or to claim the mortgaged property in cases where the security was deficient.

Had it been a sufficient one, the order would have been that the mortgagees add their costs to their security. *Millett v. Davy*, (1862) 32 L. J. Ch. 122; *Liverpool Marine Credit Co. v. Wilson*, (1872) 7 Ch. 507.

A puisne mortgagee can, as against prior incumbrancers, in the absence of special agreement, only add his costs to his debt; unless he redeems, he gets nothing, and if the property is sold, prior incumbrancers' interest and costs must be satisfied before him. *Wonham v. Machin*, (1870) 39 L. J. Ch. 789; 10 Eq. 447.

A puisne mortgagee who institutes proceedings to realize and distribute a fund, which but for such exertions would have been unavailable for the purpose of paying prior incumbrances, is entitled in priority over the prior incumbrances to have payment out of the funds of all the costs of which they have had the benefit in securing the fund and ascertaining the rights of the parties to it. As regards the rest of his costs a puisne mortgagee adds them to his security. *Ford v. Chesterfield*, (1856) 21 B. 426; *Batten v. Dartmouth Harbour Commissioners*, (1890) 59 L. J. Ch. 700; 45 C. D. 612.

Where a mortgagee actively seeks a remedy outside his contract by administering the estate of a deceased mortgagor in order to obtain payment out of the general assets of so much of his mortgage debt as the mortgaged property is unable to pay, it has been held that the costs of the suit are administration costs, and must be paid out of the proceeds of the mortgaged property in priority to the mortgagee's charges. *Wetenhall v. Dennis*, (1862) 33 B. 285; *In re Spensley*, (1872) 42 L. J. Ch. 21; 15 Eq. 16; but see *Mason v. Bogg*, (1837) 2 My. & Cr. 443; *Cook v. Hart*, (1871) 41 L. J. Ch. 143; 12 Eq. 459; *Pinchard v. Fellows*, (1874) 43 L. J. Ch. 227; 17 Eq. 421, which seem directly opposed to this view.

Of puisne mortgagee.

Benefit to prior mortgagees of action by puisne.

Administration costs.

In a later case a mortgagee was allowed to add to his security so much of his costs as he would have incurred if he had pursued his remedies as a mortgagee, but with reference to his other costs he was treated as a creditor suing for administration on behalf of creditors generally and not as a mere mortgagee enforcing his security, and these additional costs were treated as the costs of a plaintiff in an ordinary administration case. The action was brought by a first mortgagee for administration of the mortgagor's estate. The order directed an account of what was due to the plaintiffs under their mortgage and for their costs of the action so far as related to foreclosure or sale, and directed that if the proceeds of the mortgaged property were insufficient to pay the plaintiffs all that was due to them, the deficiency should be paid out of the general assets of the testator in a due course of administration. *Wright v. Kirby*, (1859) 23 B. 463; *Re Banks*, (1896) 75 L. T. 387.

Whether the mortgagee is a party or not to an administration action a sale cannot be directed free from his mortgage without his consent. *Wickenden v. Rayson*, (1855) 6 D. M. & G. 212; *Langton v. Langton*, (1855) 7 D. M. & G. 36.

On a sale
under the
Court.

By consenting to a sale in an existing action, as for administration or for the winding up of a mortgagor company, the mortgagee does not lose his right to have his principal, interest, and costs paid first out of the sale moneys after deduction of the costs of realization. *Tippling v. Power*, (1842) 1 H. 405; *In re Marine Mansions Co.*, (1867) 4 Eq. 601; *Dighton v. Withers*, (1862) 31 B. 423.

But the mortgagee has apparently been allowed priority even over costs of the sale. This is not the usual practice. No injustice is done by making a mortgagee who has

consented to sale, take the proceeds of sale subject to the costs of realization, for if the mortgagee does not desire a sale, he can rest on his security. *Hepworth v. Heslop*, (1844) 3 H. 485.

A puisne mortgagee joining in the conveyance will not be allowed his costs of doing so, in priority to the claim of the prior incumbrancer in case of a deficiency. *Wonham v. Machin*, *supra*.

A mortgagee who, in order to claim in a suit to administer the mortgagor's estate, rescinded a contract for sale of the property and offered to reconvey, was allowed to prove for his principal and interest, but not for costs of an abandoned foreclosure suit. *Haynes v. Haynes*, (1857) 3 Jur. N. S. 504.

No proof for costs of abandoned foreclosure action.

Possibly, even in the absence of a tender, the Court might order the costs of an administration action made necessary by the mortgagee to be paid out of the proceeds of sale of the mortgaged property. *White v. Gudgeon*, (1862) 30 B. 545.

The priority of the mortgagee does not extend beyond the proceeds of the mortgaged property; if that is insufficient to pay in full, his costs and residue of debt are paid out of the general estate of the mortgagor in the ordinary course of administration. *Tipping v. Power*, *supra*.

A mortgagee, by amending an action for foreclosure only, so as to claim a sale, loses no priority. *Cook v. Hart*, *supra*; distinguishing *Macrae v. Ellerton*, (1858) 27 L. J. Ch. 777.

A mortgagee on a fund in Court representing land taken under compulsory powers, must be served on a petition for payment out. The costs of serving the mortgagee and his costs of appearance, limited to 42s., must be paid by the purchasing corporation, and the residue of his

Mortgage on purchase-money of land taken compulsorily.

costs are added to his security. *Re Olive's Estate*, (1890) 59 L. J. Ch. 360; 44 C. D. 316.

The costs of trustee and mortgagee, when mortgaged property is sold in the Bankruptcy Court, depend on the Bankruptcy Rules, 68—70. The main difference from the Chancery practice is that the costs, charges, and expenses of the trustee are a first charge. *In re Jordan*, (1884) 13 Q. B. D. 228.

Costs of
trans-
ferees.

After the day fixed for payment, the mortgagee is entitled to transfer. The additional costs of action, by reason of there being transferees, must be paid by the mortgagor redeeming. *Wetherell v. Collins*, (1818) 3 Mad. 255.

It seems at first sight a great hardship that the mortgagor is to pay the costs of persons claiming under the mortgagee, and made necessary parties by his act, but it is the constant course of the Court, and it is to be supported upon this principle, that at law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own; and that if the mortgagor comes for the redemption which the equity of the Court gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts.

How paid,

In a foreclosure action, the costs of transferees are paid by the mortgagee in the first instance and then added to the debt. *Bartle v. Wilkin*, (1896) 8 S. 238.

In the absence of evidence that a transferee or trustee for the mortgagee would have consented to join as co-plaintiff in an action of foreclosure he may be added as defendant. In that case the plaintiff pays his costs and adds them to his own. *Browne v. Lockhart*, (1840) 10 S. 426.

Of settle-
ment of

Costs occasioned by the mortgagee putting the mortgage debt into settlement are to be paid by the mortgagor.

Heeler, (1852) 1 D. M. & G. 434; *Wetherell v. mortgagee*,
, *supra*. debt.

tees of an equity of redemption vested in them
rust to sell and pay off incumbrances, and then pay
to the mortgagor, were, in an action brought by a
having a charge on the mortgagee's interest in the
red property, allowed their costs of executing the
f the deed as a first charge, out of the proceeds of
Flare v. Wood, (1844) 4 H. 81.

a fixed rule, that in administration actions only Of incum-
of costs is allowed in respect of each share. If, bered
a, a share is incumbered, the mortgagee's costs shares.
e by the share. There is no such fixed rule in parti-
ons; the costs of an incumbered share are within
etion of the Court, but in the absence of special
ances the same rule is applied. *Cotton v. Banks*, 62
600; [1893] 2 Ch. 221; differing from *Belcher*
yms, (1890) 45 C. D. 510; and followed in
Ansell v. Rolfe, [1906] W. N. 9; *Langrish v. Vane*,
[1901] W. N. 124.

A mortgagor is not chargeable with (1) extra costs Assign-
incurred by adding new parties when the assignment ments
is made *pendente lite*, either voluntarily or by operation of *pendente*
law, except of assignments between the mortgagees, as *lite*.
from first to second (*Barry v. Wrey*, (1827) 3 R. 465;
Coles v. Forrest, (1847) 10 B. 552); nor when the
assignment is made after decree. *James v. Harding*,
(1855) 24 L. J. Ch. 749.

(2) Costs of transfers of the mortgaged property made Costs of
by a mortgagee without communication with the mort- transfers.
gagor, at least, if there has been no default in payment
of interest. *Re Radcliffe*, (1856) 22 B. 205.

The costs of a trustee of a mortgaged estate, put into
settlement by the mortgagor, may be allowed out of the

mortgage debt, if the mortgagee asks for sale instead of foreclosure. *Siffken v. Davis*, (1853) Kay, App. xxi.

In an action by a tenant for life to redeem a mortgage on the inheritance, the plaintiff paid the costs of the remaindermen made defendants, with liberty to add them to his own. *Riley v. Croydon*, (1864) 13 W. R. 223.

Costs of
solicitor-
mort-
gagee.

Prior to the Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25), in the absence of an express contract, a solicitor-mortgagee could only charge disbursements out of pocket. *Re Wallis, Ex parte Lickorish*, (1890) 59 L. J. Q. B. 500; 25 Q. B. D. 176.

A solicitor-mortgagee, acting as solicitor for himself and his co-mortgagee, could not charge any profit costs against the mortgagor, either as to proceedings in an action or business done out of Court. *Hibbert v. Lloyd*, 62 L. J. Ch. 14; [1893] 1 Ch. 129.

For the above Act see p. 212.

Dis-
claimer of
interest.

The general rule is, that if a defendant disclaims, the Court will in general dismiss the action against him with costs, and that is true in this sense: if his disclaimer shows that he never had any interest, or having had any, that he had parted with it, or disclaimed or offered to disclaim before action brought, he would be entitled to his costs because he was improperly made a party. But if he was interested at the time when the action was brought, and no special circumstance occurs in the case, the mere fact of his saying on the record in effect that he finds his interest worth nothing and therefore repudiates it, does not prove that he was improperly made a defendant. If a puisne mortgagee who has been paid off is made a party to an action without asking him whether he has been paid off, he is entitled to his costs as from the date of disclaimer. A defendant who has been properly made

a defendant will not be allowed the costs of proceedings in the action subsequent to disclaimer, if there is no other matter in dispute between him and the plaintiff. Judgment without costs was given against a defendant who, after disclaimer appeared on the motion for judgment of foreclosure against himself. The costs of a deed of disclaimer must be paid by the plaintiff if he requires it. *Tipping v. Power*, (1842) 1 H. 405; *Ford v. Chesterfield*, (1853) 22 L. J. Ch. 630; *Day v. Gudgeon*, (1876) 45 L. J. Ch. 263; 2 C. D. 209; *Greene v. Foster*, (1882) 52 L. J. Ch. 470; 22 C. D. 566; *Clarke v. Toleman*, (1872) 42 L. J. Ch. 23; *Lewin v. Jones*, (1884) 53 L. J. Ch. 1011.

CHAPTER XV.

THE STATUTES OF LIMITATION.

Money charged upon land and legacies to be deemed satisfied at the end of twelve years, if no interest paid nor acknowledgment given in writing in the meantime.

THE Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8 :—"No action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

Repeats prior enactment.

This section exactly repeats the language of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 40, with the substitution of twelve years for twenty. It deals with actions by a mortgagee for the recovery of money charged upon or payable out of land or rent.

Actions by a mortgagee for the recovery of land, on which mortgage money is secured, are dealt with as follows.

The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2, provided that "no person should make any entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action should have first accrued to some person through whom he claimed; or if such right should not have accrued to any person through whom he claimed, then within twenty years next after the time at which the right to make such entry or distress or to bring such action should have first accrued to the person bringing the same."

Recovery
of land.

By sect. 14 of the same Act it was provided that when any acknowledgment of the title of the person entitled to any land or rent should have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment should have been given should be deemed to have been the possession or receipt of, or by the person to whom, or to whose agent such acknowledgment should have been given at the time of giving the same, and the right of such last-mentioned person or any person claiming through him to make an entry or distress, or bring an action to recover such land or rent, should be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given,

The Real Property Limitation Act, 1837 (7 Will. 4 & 1 Vict. c. 28), provided that "it should and might be lawful for any person entitled to or claiming under any mortgage of land . . . to make an entry, or bring an action at law or suit in equity to recover such land at any

time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years might have elapsed since the time at which the right to make such entry or bring such action or suit in equity should have first accrued."

The Real Property Limitation Act, 1837, was passed in consequence of a doubt expressed by Patterson, J. in *Doe d. Jones v. Williams*, (1836) 5 L. J. K. B. 231; 5 A. & E. 291, that time would run against a mortgagee from the time when he could first enter, and that payment of interest was not an acknowledgment within the principal Act sufficient to preserve the mortgagee's rights against the mortgaged land.

This Act does not, as the principal Act does, contain "or rent" after "land." It does not, therefore, in express terms extend to a mortgage of a rent or rent-charge, but there is no reason why mortgagees of a rent should be in a less favourable position than mortgagees of land, and there is no case in which it has been decided that payment of interest on a debt secured by a mortgage of a rent-charge will not have the effect of keeping alive the mortgagee's right to distrain for the rent-charge on the land out of which it issues.

Lord St. Leonards was of opinion that there was no foundation for the doubt in consequence of which this Act was passed. Real Property Statutes, p. 27, but *secus* Lord Selborne, *Heath v. Pugh*, (1881) 6 Q. B. D. 345, at p. 363.

If it should be held that payment of interest on a mortgage was an acknowledgment within the principal Act, the Act of 1837 would be unnecessary. There would be no difference between mortgages of land and rent as to payment of interest being sufficient to bar the Statutes of Limitation.

The Act of 1837 prevents a person entitled to or claiming under a mortgage from being injured by the Act of 1833. It does not give him a new right. Possession adverse to the mortgagor existing at the date of the mortgage will at the end of twelve years from the commencement of the adverse possession bar the mortgagee. If the mortgage be an existing one and was executed before the commencement of the possession of the person claiming to have acquired a title by such possession under the Statute of Limitation, then the statute 7 Will. 4 & 1 Vict. c. 28, applies in favour of the mortgagee, although the person in possession may have acquired a good title as against the mortgagor and those claiming under the mortgagor. *Searle v. Colt*, (1841) 1 Y. & C. C. C. 36; *Doe v. Massey*, (1851) 20 L. J. Q. B. 434; 17 Q. B. 366; *Eyre v. Walsh*, (1860) 10 Ir. C. L. 346; *Adnam v. Sandwith*, (1877) 46 L. J. Q. B. 612; 2 Q. B. D. 485; *Thornton v. France*, 66 L. J. Q. B. 705; [1897] 2 Q. B. 143; *Ludbrook v. Ludbrook*, 70 L. J. K. B. 552; [1901] 2 K. B. 96.

The circumstances of each case show if the possession has been adverse. Mere omission to pay rent due at the date of the mortgage, if unaccompanied by any claim to the mortgaged property inconsistent with the mortgagor's then title, is not necessarily proof of adverse possession as against a mortgagee who had no knowledge of the delay in the payment of rent.

The Real Property Limitation Act, 1874, s. 1, reproduces the above-quoted sect. 2 of the Real Property Limitation Act, 1833, with the substitution of twelve years for twenty, and by sect. 9 enacts that the Act of 1837 shall be construed as if the period of twelve years had been therein mentioned instead of the period of twenty years.

Twelve
years pre-
sent limit.

"Judgment."

The expression "judgment" in sect. 8 of the Real Property Limitation Act, 1874, refers to judgments generally, and is not restricted to judgments which operate as charges upon land. *Watson v. Birch*, (1847) 16 L. J. Ch. 188; 15 S. 523; *Hebblethwaite v. Peever*, [1892] 1 Q. B. 124; *Jay v. Johnstone*, 62 L. J. Q. B. 128; [1893] 1 Q. B. 25, 189.

Fore-closure action.

A simple foreclosure action is not an action to recover the money secured by the mortgage, but is an action to recover land. Therefore, it is within sects. 2 and 24 of 3 & 4 Will. 4, c. 27, and not within sect. 40. *Wrison v. Vize*, (1842) 3 D. & W. 104; *Harlock v. Ashberry*, (1882) 18 C. D. 229; 51 L. J. Ch. 394; 19 C. D. 539; see R. S. C., Ord. XVIII. r. 2.

A foreclosure decree gives the mortgagee a new title, and he has twelve years after the date of the foreclosure absolute in which he can bring an action to recover the mortgaged lands. *Heath v. Pugh*, (1881) 6 Q. B. D. 345; 7 A. C. 235.

Reversionary interest.

A mortgagee of a reversionary interest in land can foreclose immediately, without waiting until the mortgaged estate falls into the possession of the mortgagor. *Sinclair v. Jackson*, (1853) 17 B. 405.

If he forecloses, it is an action to recover land within sect. 2 of the Act of 1833, and equally within sect. 1 of the Act of 1874, and may be brought "within twelve years next after the time at which the right . . . to bring such action shall have first accrued to some person through whom he claims," that is, as to an estate in reversion or remainder, twelve years after it has fallen into possession. An action to recover money charged on a reversionary interest in land is within sect. 8 of the Act of 1874, and may be brought "within twelve years next after a present right to receive the same shall have

accrued to some person capable of giving a discharge for or release of the same." *Hugill v. Wilkinson*, (1888) 57 L. J. Ch. 1019; 38 C. D. 480; *Kirkland v. Peatfield*, 72 L. J. K. B. 355; [1903] 1 K. B. 756. *In re Owen*, 63 L. J. Ch. 749; [1894] 3 Ch. 220.

With reference to the person by whom payment is to be made, there is a variation in the language of the various enactments. Payment.

The Act of 1837 (7 Will. 4 & 1 Vict. c. 28), explanatory of the Act of 1833 (3 & 4 Will. 4, c. 27), ss. 2 and 24, says, only "payment of any part of the principal money or interest." No mention is made as to the person by whom the payment is to be made. Variation of language in different sections.

But sect. 8 of the Act of 1874 (37 & 38 Vict. c. 57), replacing sect. 40 of the Act of 1833, says "some of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent."

If the words "by the person by whom the same shall be payable, or his agent" refer only to the signature of the acknowledgment, the latter sections are similar to the former, but otherwise, they differ in that they point out by whom the payment is to be made.

It would seem to have been decided that these latter words refer only to the signature of the acknowledgment, and that all sections are alike in containing no reference to the person by whom the payment is to be made, and involve by implication the addition of "by the person liable to pay." *Chinnery v. Evans*, (1864) 11 H. L. C. 115; *Harlock v. Ashberry*, *supra*; and see also *Allison v. Frisby*, (1889) 59 L. J. Ch. 94; 43 C. D. 106. By whom must payment or acknowledgment be made.

The conclusion to be drawn from the earlier cases seems to be that a payment within the words of the

statute must be made by a person in possession of the property or by an agent for him. The Privy Council went beyond this view, and appear to have held that possession or agency is not essential to make the payment effectual, and to have left open the question by whom an acknowledgment can be made. *Lewin v. Wilson*, (1886) 55 L. J. P. C. 75; 11 A. C. 639.

In the House of Lords the question was expressly left undecided, how far a payment of interest by a mortgagor who had assigned his equity of redemption could be said to be a payment by a person liable to pay, so as to bind his assignees. *Newbould v. Smith*, (1889) 14 A. C. 423.

Payments by a receiver appointed at the instance of the mortgagee over several mortgaged estates were sufficient to prevent time from running against the mortgagee with regard to all those estates, though the receiver had been in possession of only one of them, and the others had been sold by the mortgagor and possessed by his assignees for seventy years. *Chinnery v. Evans*, *supra*.

The receipt of rent from the tenants by a mortgagee in possession is not payment of principal or interest so as to bar the Statutes of Limitation. *Brocklehurst v. Jessop*, (1835) 7 S. 442; *Cockburn v. Edwards*, (1881) 51 L. J. Ch. 46; 18 C. D. 449; *Harlock v. Asbury*, *supra*.

A surrender of a policy of insurance included in a mortgage by the mortgagee to the Insurance Company without notice to the mortgagor is not a payment within the meaning of sect. 8 of the Real Property Limitation Act, 1874, though it is a payment which would be brought into account between the mortgagor and mortgagee. *Clifden, in re, Annaly v. Agar-Ellis*, 69 L. J. Ch. 478; [1900] 1 Ch. 774.

The person whose payment of interest or acknowledgment will bar the Statutes of Limitation need not

be the mortgagor or his agent, but must be bound to pay either as between himself and the mortgagee or between himself and the mortgagor—*e.g.*, a mortgagor who has assigned his equity of redemption, or by a solicitor of a person bound to indemnify the mortgagor. *Bradshaw v. Widdrington*, 71 L. J. Ch. 627 ; [1902] 2 Ch. 480.

In the present state of the authorities, it is submitted that the law appears to be that (1) an acknowledgment or payment by a stranger is insufficient ; (2) it is not clear what difference (if any) exists between acknowledgments and payments under the various enactments ; that is to say, it is not clear how far a case on an acknowledgment or payment under one section is an authority on an acknowledgment or payment under another section ; (3) nor how far an acknowledgment or payment by a person under a contract to pay, but having no interest in the mortgaged property, deprives those who are interested of the benefit of the Statutes of Limitation. *Bolding v. Lane*, 32 L. J. Ch. 219 ; (1868) 3 Giff. 561.

The cases are conflicting as to payment of interest on a mortgage debt or an acknowledgment made by some of the persons interested in a deceased mortgagor's estate preventing the Statutes of Limitation being pleaded by other persons interested in his estate.

Payments
by lega-
tees or
devisees.

No Statute of Limitation in express terms deals with the rights of the various persons interested in a deceased mortgagor's estate.

Neither the heir nor the devisee is liable to pay the capital or interest of a mortgage debt, but by the Statute of Fraudulent Devises (3 W. & M. c. 14), both the heir and the devisee are liable to the amount of the value of the estate which comes to them, and by 32 & 33 Vict. c. 46, the real estate of a deceased debtor is assets for the payment of all his debts.

By the operation of these statutes, in addition to the personal representative, the heir, the devisee, and the legatee are "a party liable" or "a person by whom the same shall be payable" in the sense that unless all the debts are paid they can by process of law be deprived of any benefit from the deceased debtor's estate.

Roddam v. Morley. The actual decision in *Roddam v. Morley*, *infra*, was that payment of interest, on a specialty debt by a tenant for life of land, kept alive the debt against a remainderman. The judgment was based on two reasons—first, that the tenant for life is so closely united in interest with the remainderman that he represents him; secondly, on the more general ground that, where several persons are liable, an acknowledgment by one, if sufficient, to preserve for the creditor his action, operates against all the persons liable and is not limited to the person making the acknowledgment. On this case the bond by its terms bound the heirs. *Roddam v. Morley*, (1857) 26 L. J. Ch. 438; 1 De G. & J. 1.

This last ground was questioned in *Dickinson v. Teasdale*, (1862) 32 L. J. Ch. 37; and in *Coope v. Cresswell*, (1867) 36 L. J. Ch. 114; 2 Ch. 112.

In the last case a debtor by specialty not charged upon land devised certain estates for payment of debts, and also devised another estate in trust for his grandson for life, which latter estate was reversionary for more than forty years, so that the trustees did not pay out of that estate any interest, and it was held that payment of interest by the devisees in trust did not under 3 & 4 Will. 4, c. 42, s. 5, keep alive the right of action against the beneficial devisee.

Who are
bound by
an ac-
know-
ledgment

It has been held that payment by a devisee for life of interest on a specialty or simple contract debt of the testator keeps the right of action alive against all persons

interested in remainder, and against all persons interested in any part of the testator's estate and against his personal assets. *In re Hollingshead, Hollingshead v. Webster*, (1888) 57 L. J. Ch. 400; 37 C. D. 651; *Dibb v. Walker*, 62 L. J. Ch. 536; [1898] 2 Ch. 429; *In re Chant, Bird v. Godfrey*, 74 L. J. Ch. 542; [1905] 2 Ch. 225.

or pay-
ment.

On the other hand there is a line of cases based on *Coope v. Cresswell*, *supra*, deciding that an acknowledgment of a mortgage debt or payment of interest thereon, binds the person making it, but does not prevent other persons interested in the land from pleading the Statutes of Limitation unless the liability was a joint one or the position of the person making the payment or acknowledgment was such that he might fairly be held to represent the other persons. *Bolding v. Lane*, (1863) 32 L. J. Ch. 219; 1 D. J. & S. 122; *In re England, Steward v. England*, 65 L. J. Ch. 21; [1895] 2 Ch. 820; *Astbury v. Astbury*, 67 L. J. Ch. 471; [1898] 2 Ch. 111.

These cases have been reviewed in the Court of Appeal. It was held that there is no difference as regards acknowledgment and payment between 3 & 4 Will. 4, c. 42, s. 5, and the Real Property Limitation Act, 1874, s. 8; also, following *Roddam v. Morley* in preference to *Dickinson v. Teasdale* and *Coope v. Cresswell*, that a payment or acknowledgment made by a person liable prevents the statute from running in favour of any person liable, and also that a person liable is not restricted to a person liable to be sued, but extends to all persons who, if the security is enforced, would be deprived of property which they would have otherwise received from the mortgagor's estate. *In re Lacey, Howard v. Lightwood*, 76 L. J. Ch. 316; [1907] 1 Ch. 330.

Payment of interest by a dowress prevents a remainder -

man from obtaining the protection of the Statutes of Limitation, *Ames v. Mannering*, (1859) 26 B. 583.

What is an acknowledgment.

An acknowledgment to bar the statute must admit the right of the mortgagee and amount to a promise to pay what is due, but a promise to pay can be inferred from a clear acknowledgment of indebtedness. *Tanner v. Smart*, (1827) 5 L. J. (O. S.) K. B. 218; 6 B. & C. 603; *Colledge v. Horn*, (1825) 3 L. J. (O. S.) C. P. 184; 3 Bing. 119; *Skeet v. Lindsay*, (1877) 46 L. J. Ex. 249; 2 Ex. D. 814; *Mitchell's Claim*, (1871) 6 Ch. 822; *Quincey v. Sharp*, (1876) 45 L. J. Ex. 347; 1 Ex. D. 72; *Prance v. Simpson*, [1854] Kay, 678.

A payment, properly made within the terms of his appointment by a receiver appointed by a mortgagee, on account of a simple contract due from a deceased mortgagor, implies a promise to pay the balance of the debt and prevents the executor of the mortgagor from relying on sect. 3 of 21 Jac. 1, c. 16. *In re Hale, Lilley v. Foad*, 68 L. J. Ch. 517; [1899] 2 Ch. 107.

Acknowledgment by mortgagor to prejudice of puisne mortgagee.

An acknowledgment of arrears of interest in writing signed by the devisee of the mortgagor and given to the first mortgagee, does not prevent the statute from running in favour of second and subsequent mortgagees. *Bolding v. Lane, supra*.

It is provided by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), as follows:—

Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession, or from the last

“7. When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor,

or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land

written
acknow-
ledgment

or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."

This section is a re-enactment of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 28, with the substitution of twelve years for twenty years.

Possession, not as mortgagor.

If a mortgagee enters into possession solely under his mortgage title, time begins to run against the mortgagor. But if the mortgagee enters as a purchaser of the equity of redemption, and the conveyance gives for his benefit the estate only of a tenant for life, he must discharge the duties belonging to an estate for life, one of which is to keep down the interest of the mortgage, and time will not run against the remainderman during the continuance of his life estate. *Raffety v. King*, (1836) 6 L. J. Ch. 87; 1 Keen, 601; *Sandar's Uses*, 314.

Possession during a life tenancy.

A mortgagee from tenant for life and remainderman who entered into possession in 1817 in his character of mortgagee and in 1823 purchased the interest of the tenant for life of the equity of redemption, was held not to have adverse possession against the remainderman during the existence of the life estate. *Hyde v. Dallaway*, (1843) 2 H. 528.

Disability.

The twelve years' bar to a redemption suit from the time when the mortgagee took possession is absolute, and not to be extended by reason of any disability of the mortgagor. *Forster v. Patterson*, (1881) 50 L. J. Ch. 603; 17 C. D. 132.

Possession of part by mortgagor.

In order to claim a title by adverse possession, it is not necessary that the mortgagee should have been in possession of the whole of the mortgaged property. As soon

as twelve years' possession has run, the mortgagee's title to that land of which he has taken possession is absolute. *Kinsman v. Rouse*, (1881) 50 L. J. Ch. 486; 17 C. D. 104.

The provisions in sect. 28 of 3 & 4 Will. 4, c. 27, and in sect. 7 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), as to acknowledgment by one of several mortgagees apply only when they have separate interests either in the money or the land. If they have joint interests, the acknowledgment of one has no effect. *Richardson v. Younge*, (1871) 40 L. J. Ch. 338; 6 Ch. 478.

Acknowledgments by joint mortgagees.

An acknowledgment of a mortgagor's right, given to him during his bankruptcy, is unavailing to enable him to redeem on the annulment of his bankruptcy. *Markwick v. Hardingham*, (1880) 15 C. D. 339.

An acknowledgment after statutory period.

A written acknowledgment or payment of interest by the person in possession of mortgaged land cannot displace an estate once made absolute; for the effect of the statute (3 & 4 Will. 4 c. 27, s. 34) is to extinguish the right, not merely to bar the remedy. *Locking v. Parker*, (1872) 42 L. J. Ch. 257; 8 Ch. 30; *In re Alison, Johnson v. Mounsey*, (1879) 11 C. D. 284; *Markwick v. Hardingham*, *supra*; *Sanders v. Sanders*, (1881) 51 L. J. Ch. 276; 19 C. D. 373.

Section 34 of 3 & 4 Will. 4, c. 27, which provides that at the determination of the statutory period of limitation for bringing an action, "the right and title" shall be extinguished, deals with an action to recover the land, in which case not only is the remedy against the land barred, but the mortgagee's interest in it is extinguished. The legal estate of the land is vested in a mortgagor who has been in quiet possession for the statutory period, and therefore, if he afterwards grants a mortgage to another person, and the subsequent mortgagee brings an action, against the mortgagor and the mortgagee against whom

Extinguishment of title of mortgagee by possession of mortgagor.

the statute has run, to enforce his security, the plaintiff may rely on such extinguishment of title in support of his own claim as first mortgagee, although the mortgagor does not rely on the statute and has, after the expiration of the statutory period, given his co-defendant a written acknowledgment. *Kibble v. Fairthorne*, 64 L. J. Ch. 184; [1895] 1 Ch. 219.

In a case to which s. 34 applies, the mortgagee's title is extinguished and the mortgagor can claim to have paid out to him, without satisfying the debt, a sum in Court representing the mortgaged property. *In re Hazeldine's Trusts*, [1907] 1 Ch. 686; on appeal, (1907) W. N. 218.

This case is distinguishable from *Lloyd v. Lloyd*, *infra*, p. 307, for there the debt was a subsisting one.

By possession of prior mortgagee.

Possession of the land by a first mortgagee does not suspend the statute from running against a second mortgagee, if the statutory period had begun before the possession of the first mortgagee.

It has been held that the statutory period as to land in possession begins to run against the mortgagee from the date when his estate became absolute at law, namely, at the time fixed for payment of the mortgage money. *Samuel Johnson & Sons, Ltd. v. Brock*, (1907) W. N. 189.

Conveyance upon trust to sell and pay debts.

A mortgage in the form of a conveyance upon trust to sell and pay the grantor's debts to the grantee, or some person for whom he is trustee, and to hold the surplus proceeds of sale (if any) upon trust for the grantor, is within sect. 7 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), and the mortgagee's title after twelve years' possession is absolute.

Effect of statute on power of sale.

By remaining in possession for twelve years without acknowledgment of the mortgagor's title, the mortgagee does not lose his power of sale.

The surplus (if any) of a sale, made after the mortgagee's title is absolute, belongs to him; but if, before his title is so secured, he sells more than sufficient to pay principal, interest, and costs, he is constructively a trustee of the surplus. See p. 198; *Locking v. Parker, supra*; *In re Allison, Johnson v. Mounsey, supra*; *Banner v. Berridge*, (1881) 50 L. J. Ch. 630; 18 C. D. 254; *Charles v. Jones*, (1886) 56 L. J. Ch. 745; 35 C. D. 544.

These cases show that a conveyance upon trust for sale to secure a sum advanced is regarded as a mortgage, and although there may be a trust declared of the surplus in favour of the mortgagor, the Statute of Limitations is a bar to an action brought by him for the surplus, if his title to the land is barred before a sale by the mortgagee. *Per* Lord Lindley, *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196.

All actions of covenant or debt upon any bond or other specialty shall be commenced within twenty years after the cause of such actions or suits, but not after. 3 & 4 Will. 4, c. 42, s. 3. Principal.

No arrears of interest in respect of any sum of money charged upon or payable out of any land or rent, shall be recovered by any distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which No arrears of interest in respect of money charged upon land to be recovered for more than six years.

Proviso where a prior mortgagee has been in possession.

shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42.

The first statute allows principal and interest on specialty debts for twenty years. The last-mentioned statute says that no more than six years' interest can be recovered by any distress, action, or suit, on any debt secured on land.

The two enactments have been reconciled by holding that six years' arrears of interest can be recovered from the land subject to the mortgage and arrears for fourteen years more against the debtor personally. In other words, that the effect of the statutes has been to give the mortgagee six years' interest in a foreclosure action, and to leave him an unsecured creditor for the additional fourteen. *Hunter v. Nockolls*, (1850) 1 Mac. & G. 640; *Du Vigier v. Lee*, (1843) 2 H. 326; *Hughes v. Kelly*, (1843) 3 Dr. & War. 482; *Sinclair v. Jackson*, (1853) 17 B. 405; *Henry v. Smith*, (1842) 2 Dr. & War. 381; *Bowyer v. Woodman*, (1867) 3 Eq. 313.

The same inconsistency arises as to principal; 3 & 4 Will. 4, c. 42, s. 3, fixing twenty years as the limit, and the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, saying that no action shall be brought to recover any principal secured on land after twelve years.

So far as the former Act allows an action to be brought within twenty years, it is virtually repealed as to money secured on land.

Redemption
action.

Sect. 42 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), does not apply to a redemption action. *Du Vigier v. Lee*, (1843) 2 H. 326; *Mason v. Broadbent*, (1863) 33 B. 296; not followed in *Edmunds v. Waugh*, (1866) 35 L. J. Ch. 294; 1 Eq. 418.

In re Marshfield, (1887) 56 L. J. Ch. 598; 34 C. D. 721; *Dingle v. Coppen*, [1899] 1 Ch. 726.

When a mortgage debt charged upon or payable out of land has been realised a mortgagor who seeks to recover the surplus from the mortgagee or any other person, after the mortgagee's title has become absolute at law, must pay all arrears of interest. A mortgagee taking active proceedings to assert his rights will be held to be recovering interest by distress action or suit and be limited to six years' arrears of interest as in an action of foreclosure. *In re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385.

Recovery
by mort-
gagor of
surplus
after sale.

There is no Statute of Limitations which, in the case of a charge on personal estate, restricts the arrears of interest to six years. *Smith v. Hill*, (1878), 47 L. J. Ch. 788; 9 C. D. 143.

In foreclosure, fourteen years after the date of a mortgage of a fund still reversionary, redemption was allowed only on payment of interest for the whole fourteen years. *Mellersh v. Brown*, (1890) 60 L. J. Ch. 43; 45 C. D. 225.

The twelve years' limitation imposed by the real Property Limitation Act, 1874, s. 8, applies to the personal remedy on the covenant in a mortgage deed for the repayment of money secured on land as well as to the remedy against the land. *Sutton v. Sutton*, (1882) 52 L. J. Ch. 333; 22 C. D. 511.

Twelve
years'
limitation.

So when a mortgage debt secured on land is further secured by a collateral bond, the remedy on the bond is barred by the lapse of twelve years since the last payment of interest or acknowledgment of the debt, equally with the remedy against the land. *Fearnside v. Flint*, (1882) 52 L. J. Ch. 479; 22 C. D. 579.

But not when the remedy against the land has

been kept alive by payments of interest by the mortgagor. *In re Powers, Lindsell v. Phillips*, (1885) 80 C. D. 291.

Surety.

Payments of interest by a principal prevents the statute running in favour of a surety. In this case it was doubted whether sect. 8 applies to a personal action unless brought against the mortgagor or his personal representatives. *Allison v. Frisby*, (1889) 59 L. J. Ch. 94 ; 43 C. D. 106.

Period for recovery of simple contract debts.

An action to recover a simple contract debt secured on land must be brought within six years. The period of limitation imposed by 21 Jac. 1, c. 16, s. 3, has not been enlarged by the Real Property Limitation Act, 1874. After the six years the personal remedy is gone, but the remedy against the land remains. *Barnes v. Glenton*, 68 L. J. Q. B. 502 ; [1899] 1 Q. B. 885.

Union of right to receive and obligation to pay.

An actual payment of interest is not necessary to bar the operation of the Statutes of Limitation when the hand to pay is also the hand to receive, that is, when the obligation to pay and the right to receive are united in the same person, as in the case of a tenant for life, who pays off a mortgage affecting the settled estates, or a husband who borrows trust funds to the income of which the wife is entitled. *Burrell v. Egremont*, (1844) 7 B. 205 ; *Topham v. Booth*, (1887) 56 L. J. Ch. 812 ; 35 C. D. 607 ; *re Hawes, Burchell v. Hawes*, (1893) 62 L. J. Ch. 468 ; *re Dixon, Heynes v. Dixon*, 69 L. J. Ch. 609 ; [1900] 2 Ch. 561 ; *Savile v. Drax*, 72 L. J. Ch. 505 ; [1908] 1 Ch. 781.

There must, however, if this rule be applied, be a liability to pay. A testator charged in favour of trustees a sum upon land, and his son became and so remained for a period exceeding twelve years owner in fee simple of the land and entitled to the income of the land. It was

admitted that the land was liable to the charge, but on the ground that the son was not liable to pay the interest on the charge, it was held that his receipt of the rents of the land was not a payment of interest within the Real Property Limitation Act, 1874, s. 8. *Steward v. England*, 65 L. J. Ch. 20; [1895] 2 Ch. 820; *re Allen, Bassett v. Allen*, 67 L. J. Ch. 614; [1898] 2 Ch. 499.

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14, enacts that a co-contractor or co-debtor shall not lose the benefit of 21 Jac. 1, c. 16, s. 3, and of the Act 3 & 4 Will. 4, c. 42, s. 3, and of the Act 16 & 17 Vict. c. 113, s. 20, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors. Co-con-
tractor.

This Act applies to the case of a surety who joined in a joint and several note; but not the case of a defendant who relies on 3 & 4 Will. 4, c. 27, for sect. 40 of which Act sect. 8 of the Act of 1874 is now substituted. *Cockrill v. Sparkes*, [1863] 32 L. J. Ex. 118, 1 H. & C. 699. *Allison v. Frisby*, *supra*.

It would seem, that if the reasoning, on which *Roddam v. Morley* was decided, applies to simple contract debts, the Mercantile Law Amendment Act also applies and prevents a payment by one person interested in the mortgagor's estate from prejudicing other persons, who by being interested also in the mortgagor's estate are co-debtors. *In re Lacey, Howard v. Lightfoot*, 76 L. J. Ch. 316; [1907] 1 Ch. 330 at p. 351.

In a foreclosure action of a mortgage secured on land a mortgagee is not entitled to interest for more than six years prior to the date of the action, though the interest is reversionary. *Smith v. Hill*, 9 C. D. 143. Rever-
sionary
interest
in land.

On the cases it is not clear how far a mortgagor coming

to redeem can restrict his payment of interest to six years.

Mortgage
on per-
sonalty.

There is no Statute of Limitation which deals with mortgages secured on assignments of personal property. A mortgagor cannot claim back mortgaged personalty on the ground that the personal remedy is gone. *London and Midland Bank v. Mitchell*, 68 L. J. Ch. 568; [1899] 2 Ch. 161.

When real and personal property are combined in one mortgage to secure one sum and there is one proviso for redemption, if the mortgagee has been in possession of the land for more than twelve years and the mortgagor's right to redeem the land is barred by s. 7 of the Real Property Limitation Act, 1874, the right to redeem the personalty is gone also. *Charter v. Watson*, 68 L. J. Ch. 1; [1899] 1 Ch. 175.

Even when the personal covenant in a mortgage of personal estate is barred, the assignment of the property may be good. *Re Lake*, (1890) 63 L. T. 416; *Hancock v. Berry*, (1888) 57 L. J. Ch. 798.

After a sale mortgagees are trustees of the surplus proceeds, and prior to the Trustee Act, 1888 (51 & 52 Vict. c. 59), could not rely as a defence in an action by the mortgagor for their recovery on any statute of limitation. Trustees can now plead the statutes except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy or is to recover trust property, or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use.

Statutes of
Limita-
tion may
now be
pleaded
by trus-
tees.

Mortgagees who had sold, after retaining their own debt, allowed the surplus to be retained by their own solicitor, who they erroneously believed had authority from the second mortgagee to receive it on his behalf.

The solicitor used the money for his own purposes and paid the interest to the second mortgagees. When the fraud was discovered fourteen years after the sale it was held that the first mortgagees were protected by the statute. *Thorne v. Heard*, 64 L. J. Ch. 652; [1895] A. C. 495.

CHAPTER XVI.

MORTGAGE OF BUILDING SOCIETIES.

Perma-
nent and
termi-
nating.

BUILDING societies are of two classes, terminating and permanent. A terminating society means a society which by its rules is to terminate at a fixed date, or when a result specified in its rules is attained; a permanent society means a society which has not by its rules any such fixed date or specified result at which it shall terminate. The Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 5.

Both classes of societies are constituted by the union of a number of persons into a society either terminating or permanent, for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of land by way of mortgage. (Sect. 13.)

Advanced
members.

Each society consists of two classes of members, namely, investing members and advanced members. A person desiring a loan from a building society takes shares in the society to the nominal amount of his proposed loan, or of some greater amount, according to the rules of the society. The amount of the loan is advanced to him. A premium is charged as a compensation to the society for allowing the loan. He covenants to make regular monthly instalments for such a period as will repay the loan and premium, and interest on both. He also covenants to pay fines of a certain amount per share, if there is any default in the punctual payment of any instalment.

The law of mortgage is not different for building societies from what it is for other mortgagees, but the peculiar position of building societies towards their advanced members introduces some differences in the results of the ordinary law of mortgage. There is, between a building society and an advanced member, a contract of membership as well as a contract of mortgage.

Building societies only require their borrower to enter into a covenant to repay the loan by instalments. As long as such instalments are regularly paid, the borrower's right to a reconveyance rests upon a legal contract, and there is no equity of redemption requiring the assistance of a Court of equity to enforce.

Instal-
ments.

From this, it follows that the society cannot consolidate, for the doctrines of consolidation rest on the loss by the mortgagor of his estate at law, and recovery of it in equity only upon condition of performing what equity thinks right. *Cummins v. Fletcher*, (1880) 49 L. J. Ch. 563; 14 C. D. 699; *Chesworth v. Hunt*, (1880) 49 L. J. C. P. 507; 5 C. P. D. 266.

Consoli-
dation.

During the punctual payment of instalments, the society cannot avail themselves of the powers given by the Conveyancing Act to mortgagees when there has been a default or the mortgage money is due, nor can they call in the mortgage money.

Premium is something in addition to the actual sum advanced. The advance and the premium are capitalized and interest is charged on the aggregate sum. The premium is calculated with reference to the duration of the loan. It is not in its nature interest, though it has the effect of making the loan dearer to the borrower. It is partly a compensation to the building society for their trouble in receiving their money in instalments, and partly a price paid by the borrower for the accommodation

Premium.

of the loan. *Ex parte Bath, In re Phillips*, (1884) 27 C. D. 509.

Fines.

Fines are sums payable by all members of a building society upon any default. As applied to advance members they are contrary to the well-established rule in equity, that a penalty in a mortgage deed for non-payment of principal or interest at the stipulated time cannot be enforced, but are protected by the Building Societies Act, 1874, s. 16, sub-s. 13 and s. 21.

The fines when incurred are principal and carry interest, if the rules of the society and the terms of the mortgage deed so provide. *Provident Permanent Building Society v. Greenhill*, (1878) 9 C. D. 122; but to the contrary effect *Parker v. Butcher*, (1867) 36 L. J. Ch. 552; 3 Eq. 762; *Clarkson v. Henderson*, (1880) 49 L. J. Ch. 289; 14 C. D. 348.

**Mortgage
by infant
member
invalid.**

Although an infant may be a member of a building society registered under the Building Societies Act, 1874, and may by sect. 38 "give all necessary acquittances," he cannot execute a valid mortgage to secure advances made to him by the society. Such a mortgage is by the Infants' Relief Act, 1874, s. 1, absolutely void as against the infant. *Nottingham Permanent Benefit Building Society v. Thurstan*, 72 L. J. Ch. 134; [1903] A. C. 6.

Redemption.

Redemption in a building society's mortgage means the right of pre-payment by the mortgagor of his instalments. It is so contrary to the policy of such a mortgage, which is not to repay principal and interest, but to pay a certain number of subscriptions as they fall due, that special provisions are necessary to work out the equities of the parties.

It would seem that, in the absence of provisions to that effect, an advanced member has no right of redemption.

Fleming v. Self, (1854) 24 L. J. Ch. 29; 3 D. M. & G. 997.

If the society is a terminating one, the scheme of payments is so framed as to form a fund to be divided after a limited period; in which case a pre-payment interferes with the general scheme. If the society is a permanent one, the object is to enable members to purchase houses for themselves by joint contributions, repaid by instalments spread over a number of years. It is against the interests of such societies to have large sums suddenly thrown on their hands, for which they may have no investments.

Pre-pay-
ments.

In order to meet the difficulty of having their arrangements disturbed by pre-payments of the instalments, the societies in their rules make elaborate provisions, by redemption tables and rules, endeavouring to fix exactly the rights of all parties when the instalments are prepaid either by the mortgagor, or by the exercise by the society of their power of sale. The decision in each case has turned on the rules of the society, or on the terms of the mortgage deed.

The principle is, that a person redeeming must pay all sums which, according to the rules of the society and the mortgage deed, will be due from him during the original period fixed for the instalments, less any money due to him from the society in respect of his shares. *Mosley v. Baker*, (1848) 6 H. 87; on appeal 13 Jur. 817.

If the society is made to terminate on the attainment of some result, it is impossible to say accurately what sums an advanced member might have to pay in the future.

The probable duration of the society must be calculated in such a manner as the circumstances permit, and the longest period taken. *Seagrave v. Pope*, (1851) 22 L. J. Ch. 258; 1 D. M. & G. 783; *Farmer v. Smith*, (1859) 28 L. J. Exch. 226.

Rebate.

An advanced member paying in advance a number of instalments, should in fairness, as it seems, receive some rebate; but this is a matter dependent entirely on the rules, as is also the amount of profit attaching to his shares for which he is entitled to credit. *Fleming v. Self, supra.*

There seems to be no difference in principle between a voluntary redemption by a mortgagor and a compulsory sale of his property by the society. In either case the society obtains a pre-payment.

On the exercise of their power of sale, a society was held entitled to retain out of the proceeds all future instalments, and to allow no rebate. *Matterson v. Elderfield*, (1869) 4 Ch. 207.

However, under words not easy to distinguish from those in the above case, a society was not allowed to retain any sum in respect of interest accruing after the principal had been all repaid. *Ex parte Osborne*, (1874) 44 L. J. Bk. 1; 10 Ch. 41.

Under the rules of a building society which required that loans upon a mortgage should be repaid by annual instalments and premiums spread over a certain number of years; it was held that the society was justified in adding the whole of the annual premiums to the capital, and charging interest upon the combined amount; and upon the borrower redeeming before the end of the period, he was not entitled to a rebate in respect of the premiums contracted to be paid. *Harvey v. Municipal Permanent Building Society*, (1884) 53 L. J. Ch. 1126; 26 C. D. 278.

Liability
of ad-
vanced
members
for losses.

An advanced member can redeem his mortgage on payment of the balance due in respect of his mortgage debt according to the rules and tables of the society. Redemption of his mortgage by an advanced member is a with-

drawal of membership of the society, after which he is no longer liable for any losses of the society. These fall on investing members alone; but (1) there may be in his mortgage or the rules an express contract that he should be liable to contribute to losses. In this case an advanced member seeking to redeem can only do so upon paying what may be due from him in respect of this liability. *West Riding of Yorkshire Permanent Building Society*, (1890) 59 L. J. Ch. 197; 43 C. D. 407.

(2) Upon a winding up, if there are no outside creditors an advanced member can redeem without reference to losses, but it would seem that a deficiency of assets for payment of outside creditors stops the right of withdrawal of an advanced member. *Tosh v. North British Building Society*, (1886) 11 A. C. 489.

In a case of a winding up of a building society (registered under the Building Societies Act, 1836, 6 & 7 Wm. 4, c. 32, but not incorporated), the order was that subject to the payment of costs, the ordinary creditors and the loan creditors should rank *pari passu* against the assets, and that any deficiency due to the ordinary creditors ought to be made good by contributions from all members, advanced or unadvanced. The advanced members are not liable to make any further contributions to the losses of the unadvanced, in the absence of any contract by the rules or otherwise to that effect. The advanced members were therefore entitled to redeem on payment according to the rules and tables of the amount of the above-mentioned contribution. *West London and General Permanent Building Society*, 63 L. J. Ch. 506; [1894] 2 Ch. 352.

In the absence of outside creditors nothing remains to be done in the winding up except to adjust the rights of the contributories or members of the society *inter se*.

There is no right on the part of some of the members to hold all the others liable in contribution to them for any loss which they may suffer. *Brownlie v. Russell*, (1883) 8 A. C. 235; *In re Counties Conservative Permanent Benefit Building Society, Davis v. Norton*, [1900] 2 Ch. 819.

Unless the rules of the society for the time being otherwise expressly provide, the arbitration clause in the Building Societies Act does not (1) apply to questions of the construction or effect of a mortgage deed; (2) prevent the society or any member, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of a mortgage between the society and the member to which he or the society would be by law entitled. It is not easy to see practically how, in a case where the rules did so provide, the remedies of foreclosure and redemption respectively could be worked out by an arbitrator without the intervention of the Court. The Building Societies Act, 1884 (47 & 48 Vict. c. 41), s. 2; *Municipal Permanent Building Society v. Kent*, (1884) 53 L. J. Q. B. 290; 9 A. C. 260; *Western Suburban Building Society v. Martin*, (1886) 55 L. J. Q. B. 382; 17 Q. B. D. 609; *Municipal Permanent Building Society v. Richards*, (1888) 58 L. J. Ch. 8; 39 C. D. 372.

Statutory
reconvey-
ance.

When all moneys intended to be secured by any mortgage or further charge given to a society have been fully paid or discharged, the society may endorse upon, or annex to, such mortgage or further charge a reconveyance of the mortgaged property, to the then owner of the equity of redemption, or to such persons and to such uses as he may direct, or a receipt under the seal of the society, countersigned by the secretary or manager in the form specified in the schedule to the Act, and such receipt

shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption without any reconveyance or re-surrender whatever. The Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42.

The effect of such a receipt is to vest the legal estate in the person best entitled to call for a conveyance; for example, where there is a first mortgage to a building society, a second mortgagee and then a third mortgagee, without knowledge of the second, if the building society's mortgage is paid off with the money of the third mortgagee, and a statutory receipt given, the legal estate vests in the third mortgagee. The legal estate thus given is held for all purposes and gives the same protection as to priority and tacking as if it had been conveyed in the usual manner. *Marson v. Cox*, (1879) 49 L. J. Ch. 245; 14 C. D. 151; *Hosking v. Smith*, (1888) 58 L. J. Ch. 367; 13 A. C. 582; overruling *Pease v. Jackson*, (1868) 37 L. J. Ch. 725; 3 Ch. 576; *Robinson v. Trevor*, (1883) 53 L. J. Q. B. 85; 12 Q. B. D. 423. The last two cases were cases of land in Yorkshire, before the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), which, by sect. 16, prevents protection by the legal estate and tacking.

A statutory receipt endorsed upon a mortgage deed by a building society is conclusive against the society, though, in fact, the whole amount due has not been paid. The loan is made by the society to a member as an advance on his share, and when by the statutory receipt the mortgage is vacated, the original liability on the shares is also vacated. *Harvey v. Municipal Permanent Building Society, supra*.

The statutory conveyance by means of an endorsed receipt is not compulsory on building societies. If they

adopt the alternative of an ordinary reconveyance as first mentioned in sect. 42, the result is the same as a reconveyance by any other mortgagee. *Carlisle Banking Co. v. Thompson*, (1884) 28 C. D. 398.

This case was a decision on the analogous section of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 16 (7). No distinction can now be drawn between the effect of a reconveyance and a statutory receipt. *Hosking v. Smith*, *supra*.

Transfer
of build-
ing so-
ciety
mortgage.

The validity of a transfer without the consent of the mortgagor of a mortgage to a building society is doubtful. *In re Rumney and Smith*, 66 L. J. Ch. 641; [1897] 2 Ch. 351.

It has been considered that a reconveyance was necessary where the mortgage was paid off by a stranger, and, in fact, transferred, and that the statutory reconveyance was applicable only where the mortgage debt was paid off by the mortgagor and, in fact, extinguished. *Sangster v. Cochrane*, (1884) 54 L. J. Ch. 301; 28 C. D. 298, decided before *Hosking v. Smith*, *supra*.

Form of
judgment.

A judgment in a foreclosure action by a building society was taken in the following form:—

Account of what was due or payable to the plaintiff society under or by virtue of their security, regard being had to the redemption tables of the society, and for the costs of this action; in default of payment of the amount to be certified within six months from date of certificate to be due, foreclosure. Reference to Chambers to appoint a receiver of the rents and of the leasehold premises. *Boney v. Charter*, W. N. (1887) 52.

Change in
rules.

A valid change in the rules of the society binds an advanced or borrowing member, if, in the mortgage deed, the covenant for payment and the proviso for redemption expressly refer to payments by the mortgagor of all

subscriptions, fines, and other moneys, which, according to the rules for the time being, are due on account of the shares in respect of which the advance has been made. *Rosenburg v. Northumberland Building Society*, (1889) 22 Q. B. D. 373; distinguishing *Smith's Case*, (1875) 45 L. J. Ch. 143; 1 C. D. 481.

The contract of a mortgagor member of a building society is one of mortgage and membership combined, though his mortgage may not refer to the rules "for the time being" he is bound by an alteration in the rules made, under and in accordance with the statutory power of altering rules, after the date of the mortgage; and the rules may be varied so as to affect the rights of a member even after he has given notice of withdrawal. The rules in question as varied, were not inconsistent with the contract of mortgage or the constitution of the society, they compelled a mortgagor to pay on redemption an additional sum as a contribution towards losses which the society had suffered. *Bradbury v. Wild*, 62 L. J. Ch. 503; [1893] 1 Ch. 377; *Pepe v. City and Suburban Permanent Building Society*, 62 L. J. Ch. 503; [1893] 2 Ch. 311; *Strohmenger v. Borough of Finsbury Permanent Building Society*, 66 L. J. Ch. 708; [1897] 2 Ch. 469; *Sixth West Kent Mutual Building Society v. Hills*, 68 L. J. Ch. 476; [1899] 2 Ch. 60.

But it is not competent for the members of a building society by an instrument of dissolution, executed under the Building Societies Act, 1874, to vary the rights of members under the rules of the society. *Botten v. City and Suburban Permanent Building Society*, [1895] 2 Ch. 441.

The Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 10. When a society under the Building Societies Act is being dissolved or wound up, a member to whom an

Liability
of borrow-
ing mem-
bers in

event of
dissolu-
tion not
increased
by change
in rules.

advance has been made under any mortgage or other security or under the rules of the society, shall not be liable to pay the amount payable under the mortgage or other security or rules, except at the time or times and subject to the conditions therein expressed. This section shall come into operation immediately after the passing of this Act. *Kemp v. Wright*, [1895] 1 Ch. 121.

Provision
for the
case of a
member
dying
intestate
leaving an
infant
heir.

The Building Societies Act (37 & 38 Vict. c. 42), s. 30. Whenever a member of a society under this Act having executed a mortgage to the society shall die intestate, leaving an infant heir or infant coheirress, it shall be lawful for the said society, after selling the premises so mortgaged to them, to pay to the administrator or administratrix of the deceased member any money to the amount of one hundred and fifty pounds which shall remain in the hands of the said society after paying the amount due to the society and the costs and expenses of the sale without being required to pay the same into the Post Office Savings Bank as provided by the Trustee Relief Act and the Acts amending or extending the same. The said sum of one hundred and fifty pounds to be considered as personal estate, and liable to duty accordingly.

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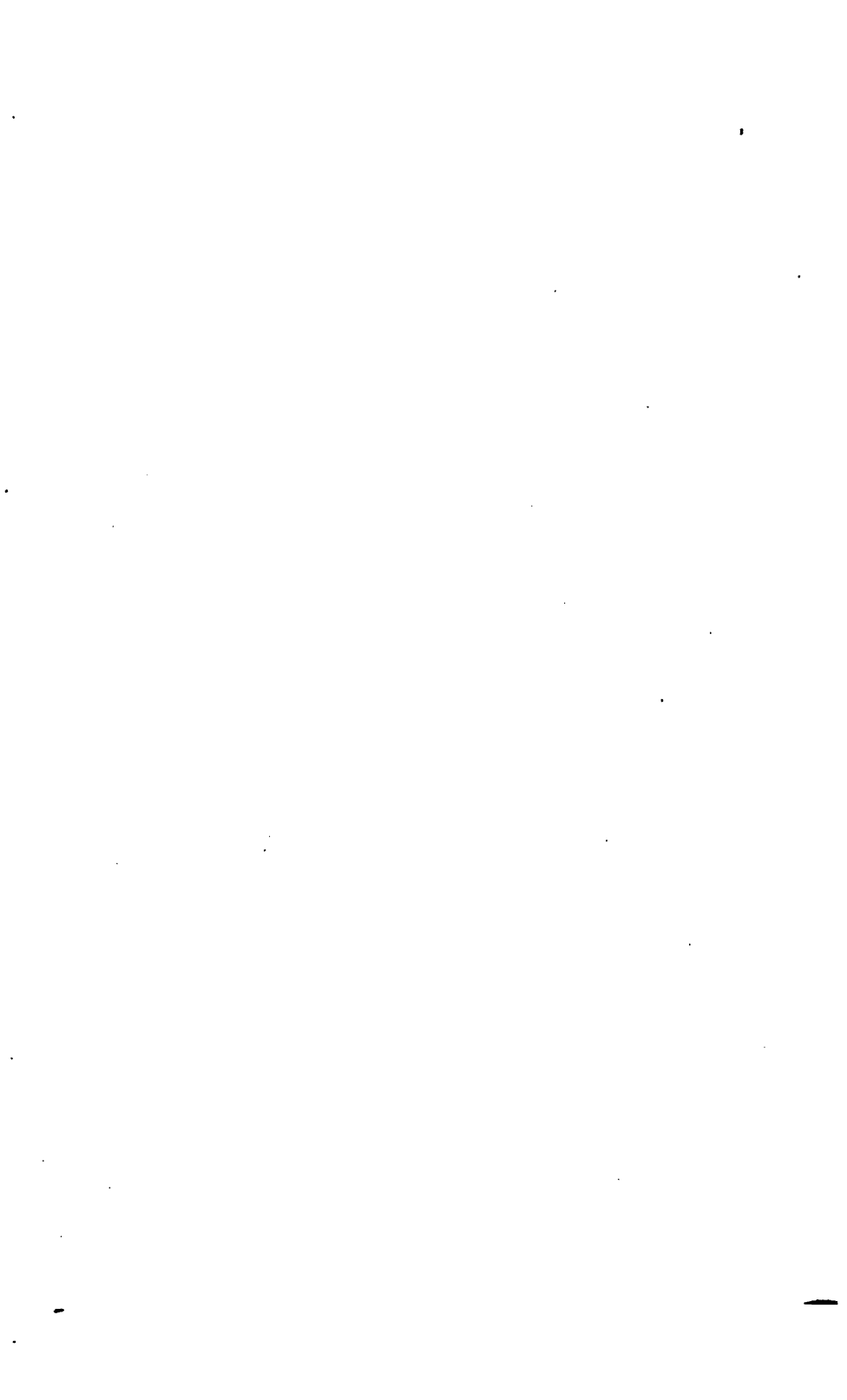
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